FILED

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No. 021788 JUN 10 2003

In The
Supreme Court of the United States

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MARK TURNER, IV,

Petitioner,

v.

RONALD ANGELONE, Director,
Virginia Department of Corrections,

Respondent.

◆

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

◆

PETITION FOR WRIT OF CERTIORARI

◆

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146 pp

QUESTION PRESENTED FOR REVIEW

1. Whether it was unreasonable to treat the Supreme Court of Virginia decision as conclusive and deny an evidentiary hearing on *habeas corpus* review, based on its finding that the trial court did not err in ruling that defense counsel's pending application for employment with the prosecutor did not constitute a conflict of interest, where the trial court never ruled on the issue and refused to conduct a hearing.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Dana Turner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinions of the Fourth Circuit and district court are unpublished. The court of appeals issued its opinion on March 12, 2003. The Supreme Court of Virginia issued its opinion on direct appeal on April 21, 2000. The opinion is published at 259 Va. 816 (2000).

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The constitutional provision involved in this petition is Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

> with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner Mark D. Turner lived with his wife and stepson in a trailer home in Pittsylvania County, Virginia. On the night of October 27, 1997, Mr. Turner and his wife got into an argument after his wife had returned home late and intoxicated. Mr. Turner was also intoxicated. During the course of the argument, Mr. Turner pointed a rifle at his wife. The gun discharged, killing Mr. Turner's wife. After realizing what had happened, Mr. Turner immediately ran outside to the driveway and lay on the ground until the police arrived. Mr. Turner never denied killing his wife, but maintained her death was an accident.

The court appointed R. Bryan Haskins to represent Mr. Turner. Subsequent to his appointment, Mr. Haskins applied for employment with the Commonwealth's Attorney David N. Grimes, who was opposing counsel. Mr. Haskins failed to disclose his pending application to his client or to the court or recuse himself as counsel.

The jury convicted Mr. Turner of second-degree murder and sentenced him to 38 years in prison. After the jury trial, Mr. Haskins accepted the position of assistant prosecutor with the Pittsylvania County Commonwealth's Attorney's Office. He informed Mr. Turner of the situation, and withdrew as counsel of record. Mr. Turner retained new counsel to represent him at the sentencing hearing before the judge and through any subsequent appeals.

New counsel then filed two motions. The first sought to remove the prosecutor from the sentencing hearing due to the conflict of interest created by having Mr. Turner's former attorney working in the prosecutor's office. The second requested the judge to set aside the jury's verdict and grant the defendant a new trial based on the conflict of interest at trial created by Haskins' responsibility to his client and his ambition to work for his adversary and the numerous resulting errors made at trial.

The trial judge denied Mr. Turner's first motion, holding that conflict of interest was present at the sentencing hearing. The court stated that the flow of information between Mr. Haskins and the prosecutor was stifled by a "Chinese wall," which prevented any corruption in the sentencing hearings. However, the judge refused to grant a hearing on Mr. Turner's second motion concerning the conflict of interest present at trial. Asserting that the issue was one for collateral appeal, the judge declined to address it and made no ruling on whether a conflict of interest existed at trial. No hearing was held on whether there was conflict of interest at trial.

The Virginia Court of Appeals also refused to rule on the issue of a conflict of interest present at trial. It stated that it could not consider on direct appeal the ineffective assistance of counsel due to a conflict of interest.

The Supreme Court of Virginia granted Mr. Turner an appeal. In its opinion, the Supreme Court of Virginia held that the trial judge decided that no conflict of interest existed at trial and upheld the conviction.

Mr. Turner began his collateral appeal and filed for a writ of *habeas corpus* in the Supreme Court of Virginia. Without an evidentiary hearing, the court denied his petition. Mr. Turner then filed a *habeas* petition in the United States District Court in the Western District of Virginia. Without an evidentiary hearing, the federal magistrate reviewed the Supreme Court of Virginia's opinion in the direct appeal and recommended that the petition be dismissed because the Supreme Court of Virginia had ruled that no conflict of interest existed. The district court judge affirmed the magistrate's recommendation. Mr. Turner appealed the ruling to the United States Court of Appeals for the Fourth Circuit, which issued an unpublished decision without hearing oral arguments, affirming the district court's decision.

REASONS FOR GRANTING THE WRIT

This case provides the Supreme Court an opportunity to correct an error committed by a State judicial system and approved, with insufficient scrutiny, by the federal courts. The Supreme Court of Virginia based its conclusion that no conflict of interest existed at trial on a circuit court decision that never occurred. Subsequently, the federal district court and the Fourth Circuit based their opinions on the erroneous conclusion. The Supreme Court of

Virginia's ruling does not deserve deference because it is an unreasonable application of clearly established federal law. The defendant was deprived of his right to the effective assistance of counsel due to a conflict of interest at trial and numerous material mistakes committed by his defense counsel. The defendant is entitled to an evidentiary hearing to establish the conflict of interest present at trial and the harm it caused.

CONFLICT OF INTEREST PRESENT AT TRIAL

I. Supreme Court of Virginia's Unreasonable Decision

Federal courts may grant a writ of *habeas corpus* with respect to any claim adjudicated in a state court proceeding if the adjudication of the claim resulted in a decision contravening clearly established federal law or is not factually substantiated. 28 U.S.C. § 2254(d). A federal reviewing court may overturn a state court's legal determinations, if (1) the state court arrived at a conclusion opposite to that of the Supreme Court of the United States on a point of law; (2) the state court decided a case differently than the Supreme Court of the United States on materially indistinguishable facts; or (3) the state court applied the correct legal principle in an unreasonable manner. Williams v. Taylor, 529 U.S. 420 (2000).

A defendant is entitled to an attorney without a conflict of interest pursuant to his rights under the Sixth Amendment to the Constitution. While the presence of a conflict does not necessarily violate a defendant's rights, a defendant may demonstrate a deprivation of adequate counsel by showing his attorney had an actual conflict of interest that adversely affected his performance on petitioner's behalf. Cuyler v. Sullivan, 446 U.S. 335 (1980). If the defendant makes a sufficient showing, prejudice is presumed. Id.

This Court reaffirmed the Sullivan standard requiring a defendant to make a showing that his defense counsel acted under an actual conflict that adversely affected his performance at trial. *See* Mickens v. Taylor, 535 U.S. 162 (2002). In Mickens, the defendant petitioned for a writ of *habeas corpus* in the federal district court and was granted an evidentiary hearing to determine the existence and extent of the conflict of interest.

The Court's opinion in Mickens held that the Sullivan standard deters "judicial dereliction" of constitutional duties and induces judges to perform inquiries regarding any conflict of interest. "[T]he Sullivan standard creates an 'incentive' to inquire into a potential conflict. In cases where the potential conflict is in fact an actual one, only inquiry will enable the judge to avoid all possibility of reversal by either seeking waiver or replacing a conflicted attorney." Mickens, 535 U.S. at 173. Despite the Court's wishful thinking, neither the trial court nor the federal district court found enough incentive to inquire into the actual conflict of interest present at trial in the case in question.

At trial, the defendant's counsel, Mr. Haskins, acted under an actual conflict of interest created by his pending application for employment in the prosecutor's office. Mr. Haskins failed to notify his client or the court of the conflict and represented the defendant at trial. After the jury convicted the defendant and recommended a sentence of 38 years, Mr. Haskins revealed his pending application for employment during trial and his new position in the prosecutor's office to his client and withdrew himself as counsel.

Prior to the final judicial sentencing hearing, new counsel filed two motions. The first dealt with the conflict of interest at the sentencing hearing stemming from Mr. Haskins' present employment with the prosecutor's office and was denied by the judge after a hearing. The second motion called for a new trial based on the conflict of interest existing at trial when Mr. Haskins represented the defendant while he had a pending application for employment with opposing counsel. The circuit court judge refused to consider the motion and denied the defendant an opportunity to present evidence on the motion, holding that it was an issue for a collateral appeal after a full development of the facts.

The Supreme Court of Virginia's decision on direct appeal was based on a nonexistent, circuit court ruling. "We hold that the trial court did not abuse its discretion in concluding that Turner failed to sustain his burden of establishing that Haskins' application for employment created an impermissible conflict between Haskins' duty of loyalty to his client and his desire to obtain employment." Turner v. Commonwealth, 259 Va. 816, 820 (2000). The opinion applied clearly-established federal law to affirm a hearing that never occurred.

The trial judge specifically declined to hear any evidence allowing the defendant to meet his burden. "One [motion] was a conflict that counsel argues was created by the application of Mr. Haskins to the Commonwealth Attorney's Office prior to the trial of this matter. That is something I guess is beyond the scope of this Court at this time."[1] Pet. App. 89a. The issue was left for a collateral appeal. The Supreme Court of Virginia based its opinion on a phantom ruling.

In subsequent appeals, the decisions of the federal magistrate, district judge and Fourth Circuit, made without an evidentiary hearing, compounded the errors committed by the Supreme Court of Virginia. The federal district court conceded the trial transcript suggests the circuit judge only ruled on Mr. Turner's request for a special prosecutor, but it upholds the Supreme court of Virginia's interpretation under the veil of a federal statute. In *habeas corpus* proceedings, the federal courts may overrule state court findings of fact in the face of clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The trial transcript represents the clear and convincing evidence required. A reading proves the circuit judge made only one ruling and refused to rule on the conflict of interest present at trial. Pet. App. 89a.

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[1] Even the prosecutor argued the ineffective assistance of counsel due to the conflict of interest at trial could not be considered by the trial court. "I just wanted to make sure we're limiting, in fairness to all parties here, including the Commonwealth, the defendant and Mr. Haskins, that we're not inquiring into things of that nature [ineffective assistance of counsel due to the conflict of interest at trial] at this stage of the proceedings." Pet. App. 77a. The prosecutor continued his argument against a hearing considering the conflict. "[I]f we're talking about the substantive questions of ineffective assistance, that's exactly why there is another proceeding, a *habeas* proceeding … . Obviously, if we try to do *habeas* things right on top of trials, we would have a mess and apparently the legislature sorted those issues long ago for us." Id. at 88a.

Basing their opinions on the unreasonable decision rendered by Virginia's highest court, the federal courts have upheld the defendant's conviction and denied the defendant a hearing regarding the conflict of interest present at trial. All of the subsequent decisions are based on the same tainted thread originating in the Supreme Court of Virginia.

By refusing to hear the conflict of interest issue, the trial judge prevented the defendant from presenting any evidence or calling Haskins as a witness to prove the conflict and its effects. No evidence was ever allowed concerning the effect of the employment application on Haskins' performance and his decisions as trial counsel. By misinterpreting the actions of the trial court, the courts have denied the defendant an opportunity to be heard.

The fact that defense counsel's conflict of interest was discovered after the conclusion of the jury trial should not work against this defendant. The courts have never provided him a forum to present evidence proving the conflict of interest. Mr. Turner had no indication of the need to be suspicious of his counsel's motives. When an attorney fails to disclose his conflict of interest, the need for a court inquiry exploring the conflict is at its peak - especially if the concealment is made pursuant to the attorney's self-interests. Mickens, 535 U.S. at 205-206 (Souter, J., dissenting). The Court should resist denying the defendant his right to counsel by Mr. Haskins' stealth.

Cases such as this threaten to obscure the line between the prosecution and defense, a threat that poses a significant danger to the public confidence in the judicial system. If attorneys are allowed to advance their careers to the detriment of their client, the principles established as the foundation of the American legal system have vanished. The Supreme Court of Virginia made a mistake, and the federal courts have refused to correct it.

The Court now possesses the opportunity to establish a clear, necessary line between counsel for the State and counsel for the defense. It is imperative that trial courts make a sufficient inquiry into the possibility of prejudice to a client resulting from a conflict between an attorney's duty to his client and his own self-interest. In theory, a strong ethics code works well. In practice, corruption and conflicts pose a problem too serious to be ignored.

II. Ineffective Assistance of Counsel Resulting from Conflict

Because of his ambition for employment and unwillingness to risk offending the prosecutor, Mr. Haskins committed numerous errors while representing the defendant. He even admitted to one character witness, James Allen, that he was worried about offending the prosecutor. Pet. App. 111a-113a. He failed to call character witnesses, failed to object to inadmissible evidence that was introduced by the prosecution, failed to pursue the motions he made and failed to object to the proffered jury instructions. Mr. Haskins neglected to zealously represent his client.

The federal district court affirmed the magistrate's report, which recognized that the Supreme Court of Virginia did not reasonably apply Strickland v. Washington, 466 U.S. 668 (1984). "The Report recognizes that disputes exist as to the reasonableness of counsel's performance on some issues and finds that the Supreme Court of Virginia's failure to resolve these issues was not a reasonable application of Strickland." Pet. App. 9a.

A. Failure to call character witnesses at trial

Despite numerous good character witnesses being available to testify at trial, Mr. Haskins called no witnesses to sway the jury's opinion of the defendant.[2] He never advised the defendant that the character witnesses could testify before the jury determined his sentence. The sentencing hearing was held during the late evening hours, and instead of presenting testimony, Mr. Haskins simply rested his defense without any evidence.

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[2] This excerpt provides an example of the character witness testimony available at trial.

Direct Examination

By Mr. Berger:

Q: You're Scarlett Hall?
A: Yes, sir.
Q: Ms. Hall, how do you know Mark Turner?
A: Mark and I met in a local nightclub.
Q: Okay, and did you all go together?
A: Yes, sir.
Q: Did you actually live together?
A: Yes, sir.
Q. For about how long?
A: Approximately a year.
Q: When was that?
A: 1990-91.
Q: Can you tell the Court about his character?
A: Mark has a great personality, a great big heart, very honest very trustworthy, a good person.
Q: Okay, is he a violent person?
A: No, sir.
Q: Have you ever known him to be violent?
A: No, sir.
Q: He ever threaten you?
A: No, sir.
Q: When you all broke off the relationship, was that a mutual thing?
A: Yes, sir. More or less.
Q: Did you start dating his best friend thereafter?
A: I did.
Q: Was he happy about that?
A: No.
Q: Do you believe that he can be rehabilitated?
A: I believe Mark has been rehabilitated. He's met the rehabilitator.
Q: Would you have any concern of being around Mark or having him around your family?
A: No, sir, none at all.
Mr. Berger: That's all the questions I have.

In Virginia, the jury possesses significant discretion in determining its sentence. Twenty-one character witnesses were available to testify at trial, but Mr. Haskins failed to call any of them. Furthermore, he failed to interview seven of the witnesses and ignored 11 additional witnesses supplied by the defendant. The witnesses would have provided a human side to the defendant, which the jury did not see. If heard, their testimony would have provided a basis for understanding the defendant and demonstrated his remorse for causing the death of his wife. The testimony would have mitigated the defendant's wrong, and there is a "reasonable probability" it would have resulted in a different result.

Mr. Haskins also failed to advise the defendant that he could testify to the jury prior to sentencing. The defendant would have testified to his love for his wife and his remorse for causing her death. Mr. Haskins filed an affidavit in connection with the defendant's state *habeas corpus* petition. In the affidavit, Mr. Haskins asserted that he discussed the defendant's opportunity to testify and that the defendant agreed not to take the witness stand. A conflict exists between Mr. Haskins' affidavit and the defendant's claims, which deny any discussion concerning his testimony occurred. Despite the fact that the federal magistrate found the Supreme Court of Virginia erred in accepting

Mr. Haskins' assertions over the defendant's claims without a hearing, the federal court denied the defendant an evidentiary hearing.

B. Failure to object to inadmissible evidence

Mr. Haskins failed to object to numerous pieces of testimony provided by the prosecution's witnesses. The testimony from James Shelton, the victim's son who lived with the couple, was filled with irrelevant information and prejudicial personal opinions, but was admitted without objection from Mr. Haskins.

Defense counsel also failed to object to the testimony of Anna Conrad, a co-worker of the victim, who testified a man, identifying himself as the victim's husband, called the Applebee's Restaurant where she and the victim worked. The man threatened to "get" any man who worked there, if he messed with the victim. However, Ms. Conrad was unable to identify the defendant or his voice. The testimony was inadmissible, but Mr. Haskins failed to raise any objection.

The prosecution offered the testimony of the victim's boyfriend, W. Phillip Crews without objection from Mr. Haskins. The prosecution offered the testimony to kindle the jury's sympathy toward the victim. His statements included that the victim "was having a lot of problems," "everything was going down hill," "she really needed to talk to me," "she was very upset about the situation at home," "she didn't know what to do" and "she told me she had already found her a house, that she was moving." Mr. Haskins failed to object to any of this testimony, which was extremely prejudicial and constituted hearsay. The lack of objections demonstrates the unwillingness of counsel to challenge the prosecutor.

C. Failure to pursue motions made

1. Waiver of Miranda Rights

Defense counsel made a written motion to suppress the defendant's statement made to police the night of his wife's death in violation of the principles enunciated in Miranda v. Arizona, 384 U.S. 436 (1966). However, in the hearing to consider the motion, which occurred 10 days after Mr. Haskins filed his application with the prosecutor, he produced no evidence other than the testimony from the investigator assigned to the case. Mr. Haskins then conceded the argument by saying:

> Your honor, if the Court please, we had originally asked that all statements, taped or otherwise, be suppressed by the defendant. Of course, as often happens in these cases, I would file these motions as a precautionary measure, but we've gone through this issue with the Commonwealth. Now, the investigator's indicated my client was advised twice, and offered these statements ... .

Mr. Haskins neglected to produce available evidence showing the defendant's condition at the time of his statement. He was grief-stricken by his wife's death, significantly intoxicated from alcohol and prescription medication and exhausted from his lack of sleep that night. He was in no condition to knowingly and intelligently waive his Miranda rights, especially before a police interrogation, which began at 4:55 a.m.

2. Suppression of search of defendant's home

Although defense counsel filed a written motion to suppress the search of the defendant's home, performed without a search warrant or the defendant's consent, the court held no hearing to consider the facts or evidence related to the unlawful search. Counsel failed to pursue his motion. Due to the defendant's intoxication, he was unable to grant valid consent to police to search his home. Mr. Haskins offered no evidence or argument concerning the unconstitutional search.

Evidence discovered during the unlawful search should have been suppressed because it was seized in violation of the defendant's Fourth Amendment rights. Mr. Haskins abandoned his attempt to suppress the evidence found at the defendant's home, and his efforts certainly fail to reach the touchstone of zealous representation. The admission of the evidence seized from his home greatly prejudiced the defendant.

D. Failure to properly instruct the jury

Defense counsel failed to request an instruction allowing a finding of voluntary manslaughter. Voluntary manslaughter is defined as a killing in the heat of passion, an intentional killing without malice or where the mind of the actor is not under reason or is incapable of forming malice. The State's evidence showed that Turner and his wife were involved in a heated argument at the time of her death, that Turner was jealous of his wife and believed she was involved with another man, that she returned home, intoxicated, after midnight and that Turner was intoxicated. The evidence supports the conclusion that the defendant was provoked and acted in the heat of passion.

However, Mr. Haskins failed to request a jury instruction dealing with voluntary manslaughter. The jury was thereby prohibited from considering the offense. After trial, Mr. Haskins admitted telling the defendant that "he had to choose" between an instruction concerning voluntary manslaughter or involuntary manslaughter, implying both could not be given. Not requesting an instruction explaining voluntary manslaughter constitutes ineffective assistance of counsel.

E. Deprivation of Right to Impartial Jury

1. Contamination of the jury

The Sixth and Fourteenth Amendments to the United States Constitution guarantee each defendant the right to a trial by an impartial jury. Mr. Haskins failed to cleanse the jury pool of bias by allowing the relatives of sheriff's deputies to remain on the panel.

During jury selection, Mr. Haskins used a peremptory challenge to strike Carolyn Simpson, the wife of the chief investigator in the defendant's case. The juror should have been stricken for cause rather than requiring use of a peremptory challenge. Mr. Haskins also failed to strike two other jurors who were related to members of the sheriff's department investigating the case. Clinton Jefferson, father-in-law of a deputy sheriff, was allowed to sit on the jury and serve as foreman. Carolyn Towler, wife of a deputy sheriff, was also allowed to serve on the jury.

All three of these jurors should have been stricken for cause. Although, Mr. Haskins eliminated Ms. Simpson by use of a peremptory challenge, he failed to investigate or object to the bias held by Mr. Jefferson and Ms. Towler. Allowing these witnesses to serve on the jury denied the defendant his right to an impartial venire and impartial jury. Mr. Haskins made no inquiry, and the defendant has been denied a hearing to determine the jurors' bias.

2. Batson motion

The systematic exclusion of women from the jury by use of peremptory strikes was held to violate the Equal Protection Clause. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). Upon a claim of gender discrimination and a prima facie showing of such discrimination, the party exercising the challenge is required to provide a legitimate reason for the strike. The explanation must show that the challenge is based on a juror characteristic, other than gender, and is not pretextual.

During jury selection, the prosecution used all four of his peremptory strikes to remove women from the jury pool. Mr. Haskins made a Batson motion objecting to the strikes, but his argument was weak and ineffective. The prosecutor gave feeble and untrue reasons for striking the women, and Mr. Haskins failed to offer any rebuttal or challenge the reasons. The prosecutor cited Cynthia Robertson's service on a prior jury, which had difficulty reaching a verdict, as the reason for the peremptory strike against her. However, Clinton Jefferson, who was not only allowed to sit on the jury, but served as the jury's foreman, served on the same indecisive jury as Ms. Robertson. The prosecution's proffered reason was mere pretext, invalid and false, but Mr. Haskins failed to object or challenge the prosecution's explanation.

CONCLUSION

The effect of the mistakes made by counsel exceeded the threshold of ineffective assistance of counsel. Mr. Haskins made several key mistakes, which carried adverse effects for the defendant. From the beginning the jury was biased. It was unable to learn anything about the defendant's personality or his remorse, leaving it uninformed while rendering its verdict and formulating its sentence. The jury's decision was also hindered by the admission of evidence, which had no reason for being presented other than to prejudice the jury and distort the nature of the defendant's act. Mr. Haskins did very little to protect his client's interests at trial.

The errors present in this case are enough to find for the defendant, but they are magnified by the motives behind them. Defense counsel lacked undivided loyalty to his client. His actions were influenced by his own ambitions to work for the prosecutor. He used the defendant's case to advance his career, and the Court should be offended by the lack of integrity on both sides of the case. Both the prosecutor and defense counsel were aware of the conflict.

In a dissenting opinion filed along with the Supreme Court of Virginia's mistaken opinion, Justice Koontz and Justice Hassell state that the relationship between Mr. Haskins and Mr. Turner was compromised because of the pending application of employment. The right to a fair trial "lies at the very basis of organized society and confidence in our judicial system." Turner, 259 Va. at 821 (Koontz, J., dissenting). A fair trial certainly requires loyal counsel.

The dissent posed an astute question: Would the members of the Court wish to be tried under the same circumstances as the defendant, with the prosecutor's hand on both sides of the case? The answer undoubtedly comes back in the negative. No esteemed justice, or any reasonable person, would allow himself to be tried under the same circumstances as the defendant. The mere appearance of a conflict leads to a lack of confidence in the judicial system. The public demands the highest degree of integrity from its legal system, especially in criminal trials, and both sides of the case failed to demonstrate these requisite values.

To err is human, and, to combat the inaccuracies and mistakes that inevitably occur when human decision-making is involved, the American legal system has been constructed to afford a defendant numerous opportunities to question the authority, which takes his life or liberty. In a case such as this, the federal courts have an obligation to ensure the minimal constitutional requirements are met. The federal district court should have made an evidentiary inquiry into the conflict of interest present at trial. The duty to make an inquiry is "manifest and unqualified." Mickens, 535 U.S. at 185 (Stevens, J., dissenting).

At present, the public perceives the judicial system as an untrustworthy entity. Lawyers and judges are seen as players in a game centered around winning and politics rather than justice. "It would be incomprehensible to the public that a defendant's rights to a fair trial was not seriously compromised in a case ... where the Commonwealth appoints an attorney to represent the defendant and during the trial that attorney is actively seeking employment with the prosecuting attorney." Turner, 259 Va. at 822 (Koontz, J., dissenting).

This case works to blur the line between the prosecution and the defense further. The defendant's right to adequate assistance of counsel was compromised. The Court should act to reinstate the public's trust in the judicial system. "Justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954). The defendant is entitled to a hearing to determine whether a conflict of interest existed at trial that affected his rights.

In the end, Mr. Haskins received a position in the prosecutor's office; Mr. Turner received a prison cell for 38 years and no chance to explain. Mr. Haskins played "loose with loyalty to [his] client[] and the fundamental guarantee of a fair trial. Mickens, 535 U.S. at 205 (Souter, J., dissenting). His representation of Mr. Turner runs counter to the rights the Constitution guarantees. This case represents an opportunity to elevate our judicial system on the values it was established to protect.

For the foregoing reasons, the Petitioner prays that this Court will grant him a writ of certiorari appeal.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-7601

MARK D. TURNER,
Petitioner - Appellant,

versus

RONALD ANGELONE, Director,
Virginia Department of Corrections,
Respondent - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Senior District Judge. (CA-01-842-7)

Submitted: February 20, 2003
Decided: March 12, 2003
[Entered: March 12, 2003]

Before LUTTIG, WILLIAMS, and SHEDD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Glenn Lee Berger, BERGER & THORNHILL, Altavista, Virginia, for Appellant. Virginia Bidwell Theisen, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Mark D. Turner, seeks to appeal the district court's order denying relief on his petition filed under 28 U.S.C. § 2254 (2000). We have reviewed the record and conclude that Turner has not made a substantial showing of the denial of a constitutional right. See Turner v. Angelone, No. CA-01-842-7 (W.D. Va. Sept. 27, 2002). Accordingly, we deny a certificate of appealability and dismiss the appeal. See 28 U.S.C. § 2253(c) (2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

NO. 02-7601
CA-01-842-7

MARK D. TURNER,
Petitioner - Appellant,

v.

RONALD ANGELONE, Director,
Virginia Department of Corrections,
Respondent - Appellee.

FILED: March 12, 2003
[Entered: March 12, 2003]

Appeal from the United States District Court for the Western District of Virginia at Roanoke

In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

/s/ Patricia S. Connor
CLERK

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Entered: April 3, 2003

MANDATE

TO: Clerk, District Court/Agency

FROM: Shirley J. Beasley
Deputy Clerk

RE: 02-7601 Turner v. Angelone
CA-01 -842-7

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 3/12/03.

[ ] Order and Certified Copy of Judgment
[x] Opinion and Certified Copy of Judgment
[ ] Order on Costs
[ ] Order dismissing appeal R42(b) or Local Rule 45
[ ] Other: ______________________________
[ ] The record has been retained for use in case number ________

A copy of the judgment is enclosed to counsel/pro se parties.

cc: Virginia Bidwell Theisen
Glenn Lee Berger

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

MARK D. TURNER,
Petitioner

v.

RONALD ANGELONE,
Respondent.

Civil Action No. 7:01-cv-00842

MEMORANDUM OPINION

By: Hon. James C. Turk
United States District Judge
[Entered: September 26, 2002]

This habeas action is before the court upon the Report and Recommendation of the U.S. Magistrate Judge, prepared pursuant to 28 U.S.C. § 636(b). The Magistrate Judge recommended that the respondent's motion to dismiss be granted and that the petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, be dismissed. The ten days allotted under §636(b) for parties to object to the findings and recommendations in the Magistrate Judge's Report have expired.

Petitioner, through counsel, filed timely objections.[1] However, upon de novo review of the parts of the Report and the record pertinent to the objections, the court finds that the objections must be overruled.

Turner first objects to the Magistrate Judge's recommendation that Claim A and its subparts be dismissed, pursuant to the standard of review set forth in 28 U.S.C. §2254(d). These claims allege that Turner's trial counsel had an actual conflict of interest during his representation of Turner because approximately two weeks before the trial, he sent an application and resume to the Office of the Commonwealth's Attorney in response to an advertised job opening for an Assistant Commonwealth's Attorney. Between the time of Turner's conviction and the date of sentencing, counsel met with the Commonwealth's Attorney about the job opening and was offered and accepted the position. At that point, he informed his clients with pending criminal cases, including Turner, of this potential conflict in future proceedings. Turner immediately retained his present counsel, who then represented him at sentencing, on appeal and during all habeas proceedings. On December 4, 1998, the date of Turner's sentencing, the trial court also heard arguments on the conflict of interest issue. Turner's trial counsel took the stand and his current counsel cross-examined. Based on the evidence so presented, the trial court denied all post-trial motions related to the conflict issue.

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[1] The Report contained boilerplate language referring to the petitioner as "a Virginia inmate proceeding pro se, when, in fact, he is represented by counsel in these habeas proceedings. The court does not find this typographical error to be ground for formal amendment of the Report.

Under §2254(d), a federal reviewing court must uphold state court legal determinations unless it finds one or more of the following situations: 1) the state court has arrived at a conclusion opposite to that of the United States Supreme Court on a point of law; 2) the state court has decided a case differently from the United States Supreme Court on materially indistinguishable facts; or 3) the state court has applied the correct legal principle in an unreasonable manner. See Williams v. Taylor, 529 U.S. 420(2000). When no Supreme Court precedent is directly controlling of the issue, the federal habeas court must analyze whether the state courts applied relevant, existing precedent in an objectively reasonable manner. Id. In Cuyler v. Sullivan, 446 U.S. 335 (1980), the United States Supreme Court held that a defendant may prove a Sixth Amendment violation if he shows 1) that counsel had an actual conflict of interest 2) that adversely affected counsel's representation. The Magistrate Judge reports that the United States Supreme Court has not addressed the instant issue, whether defense counsel's mere application for employment with the prosecutor's office creates an actual conflict of interest under Cuyler. However, the Report cites two cases from different federal courts of appeals finding that such a situation created no conflict. See Garcia v. Bunnell, 33 F.3d 193, 199 (9th Cir. 1994)(defense counsel's planned future employment with district attorney's office did not create actual conflict of interest); United States v. Horton, 845 F.2d 1414 (7th Cir. 1988)(no per se rule of conflict where defense attorney seeks employment with prosecutor's office). The Report concludes that 1) the Supreme Court of Virginia made a factual finding as to the nature of the circuit court's ruling on the conflict issue, to which this court must defer,[2] and that 2) the Supreme Court of Virginia's disposition of Turner's conflict of interest claims was not unreasonable, in light of the relevant precedents in Garcia and Horton.

Turner argues in his objection that the trial court's statements in the December 2000 hearing clearly indicate that the court did not believe it had jurisdiction to address Turner's claims of ineffective assistance based on counsel's conflict before and during trial, as such claims should be raised in habeas proceedings. Turner asserts that the trial court's finding of "no conflict" referred only to Turner's request for appointment of a special prosecutor based on the conflict created after trial by counsel's actual acceptance of the new job as an assistant prosecutor. In reviewing the December 2000 transcript, this court agrees that one could interpret the trial court's statements as Turner does. However, under §2254(e)(1), the court must presume that the Supreme Court of Virginia's interpretation of the trial court's findings is correct, absent a showing of clear and convincing evidence. See also Sumner v. Mata, 449 U.S. 539, 546-47 (1981)(former version of §2254(d) required federal court to apply presumption of correctness "to factual determinations made by state courts, whether the court be a trial court or an appellate court"). Turner fails to overcome this presumption. Furthermore, under §2254(d), the court cannot find that the Supreme Court of Virginia's disposition of the conflict claims is unreasonable, in light of relevant precedent on the issue. See Garcia, Horton, supra. Once the state court reached the reasonable legal conclusion that defense counsel's intent to seek a prosecution job did not create an actual conflict of interest under Cuyler, Turner could not, and cannot, meet the standard under Cuyler on any of his conflict claims. This court overrules Turner's objection to the recommended disposition of Claim A and its subparts.

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[2] See 28 U.S.C. §2254(e)(l)(requiring habeas court to presume state court findings of fact to be correct absent rebuttal by clear and convincing evidence).

Next, Turner objects to the Magistrate Judge's finding that the Supreme Court of Virginia's disposition of Turner's other ineffective assistance claims was not an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984), even in cases where the state court ignored disputes of fact between the affidavits of petitioner and counsel. The Report recognizes that disputes exist as to the reasonableness of counsel's performance on some issues and finds that the Supreme Court of Virginia's failure to resolve these issues was not a reasonable application of Strickland. However, upon concluding that the Supreme Court of Virginia's finding of no prejudice under Strickland as to these claims was not based on disputed facts and was not an unreasonable application of that precedent, the Report recommends dismissal of the claims, pursuant to §2254(d). The court finds this disposition to be a proper application of the statute. See Belly. Jarvis, 236 F.3d 149, 163 (4th Cir. 2000)(finding that under §2254(d), a "federal habeas court must uphold the state court's decision unless, after the permissible independent review, it is clear that the result reached by the state court 'contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of facts in light of the evidence presented'"). Thus, the court agrees with the Report that the state courts' disposition of the ineffective assistance claims was not unreasonable and overrules Turner's objections on this ground. The court finds the remainder of Turner's objections to be equally unconvincing. Based on the foregoing, the court will adopt the Report and Recommendation in its entirety. An appropriate order shall be issued this day.

Petitioner is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within 30 days of the date of entry of this Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5). The Clerk is directed to send certified copies of this memorandum opinion and the accompanying order to counsel of record for the parties.

ENTER: This 26th day of September, 2002.

/s/The Honorable James C. Turk
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

MARK D. TURNER,
Petitioner,

V.

RONALD ANGELONE,
Respondent.

Civil Action No. 7:01-cv-00842

FINAL ORDER

By: Hon. James C. Turk
United States District Judge
[Entered: September 26, 2002]

In accordance with the foregoing, it is hereby

ORDERED

that the petitioner's objections shall be and hereby are **OVERRULED**; that the Report and Recommendation of the Magistrate Judge shall be and hereby is **ADOPTED** in its entirety; that the petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, shall be and hereby is **DISMISSED**; and that this action is hereby stricken from the active docket of the court.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to counsel of record for the parties.

ENTER: This 26th day of September, 2002.

/s/The Honorable James C. Turk
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MARK D. TURNER,
Petitioner,

v.

RONALD ANGELONE,
Respondent.

Civil Action No. 7:01-cv-00842

REPORT AND RECOMMENDATION

By: Hon. Glen E. Conrad
United States Magistrate Judge

[Entered: August 20, 2002]

Petitioner Mark D. Turner, a Virginia inmate proceeding pro se, brings this action as a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254. On April 13, 1998, petitioner was convicted by a jury of second degree murder and use of a firearm in the commission of a murder. Petitioner was sentenced to a term of 38 years on December 4, 1998. He now challenges these convictions for the following reasons:

A. Petitioner was denied effective assistance of counsel due to counsel's conflict of interest which resulted in:

1. Counsel's failure to call character witnesses at the penalty phase of petitioner's jury trial;
2. Counsel's failure to investigate, challenge, and pursue a Batson motion;
3. Counsel's failure to properly question and object to jurors with bias;
4. Counsel's failure to object to the admission of certain evidence;
5. Counsel's failure to assure that the jury was properly instructed and to preserve objections to instructions.

B. Petitioner was denied effective assistance of counsel when:

1. Counsel failed to reveal his conflict of interest with the petitioner and counsel failed to remove himself from the case;
2. Counsel failed to call character witnesses at the penalty phase of the jury trial;

3. Counsel failed to investigate, challenge, and pursue a Batson motion;

4. Counsel failed to properly question and object to jurors with bias;

5. Counsel failed to object to the admission of certain evidence;

6. Counsel failed to pursue

    a. A Motions to Suppress petitioner's statements and evidence seized from his home, and

    b. A Motion in Limine to exclude evidence of prior bad acts by petitioner;

7. Counsel failed to assure that the jury was properly instructed and to preserve objections to instructions;

8. Counsel failed to investigate, advise, and prepare petitioner for trial.

C. Petitioner was denied his right to a fair and impartial jury.

D. Petitioner was denied his right to a fair and impartial jury due to prosecutorial misconduct.

E. Petitioner was denied his right to due process and a fair and impartial trial due to prosecutorial misconduct.

In an order dated July 22, 2002, United States District Judge James C. Turk referred this matter to the undersigned magistrate judge, pursuant to 28 U.S.C. §636(b)(1)(B). As directed by the order of reference, the undersigned submits this Report and Recommendation.

SUMMARY OF THE EVIDENCE

Petitioner was married to the victim. Kim Turner. and lived with her in a trailer home owned by the victim. Sometime in the second half of 1997, the victim's son, James Paul Shelton, moved into the trailer with the couple. On the night of October 27, 1997, petitioner and victim got into an argument. James Shelton, while in his room, heard a loud noise and when he reached the master bedroom, he found his mother lying on the floor with a bloody face. When Investigator Jerry Hagerman of the Pittsylvania County Sheriffs Department arrived at the scene, he found petitioner lying in the middle of the road and a rifle lying next to him. Petitioner was arrested and charged with the murder of his wife.

Petitioner applied for and received court appointed counsel in the person of R. Bryan Haskins on January 12, 1998. Subsequent to his appointment, Haskins, by a letter dated March 30, 1998, applied for a job as assistant prosecutor with David N. Grimes, Commonwealth Attorney for Pittsylvania County. Mr. Grimes was opposing counsel in petitioner's case. According to petitioner, Grimes subsequently informed Haskins that an interview was not necessary.[1] However, Haskins continued to represent petitioner and at no time did he reveal the potential conflict of interest to petitioner. Twelve days following petitioner's trial on April 13, 1998, Haskins accepted the job from Grimes and informed petitioner of the situation. Haskins then withdrew as counsel of record for petitioner and new counsel, Glen L. Berger, was appointed to represent petitioner during sentencing and any subsequent appeals. Prior to sentencing, petitioner's new counsel moved to set aside the jury's verdict based upon several grounds.

PROCEDURAL HISTORY

On December 4, 1998, Circuit Court Judge Charles J. Strauss sentenced petitioner to 38 years imprisonment. Petitioner then filed timely appeals to the Court of Appeals of Virginia and the Supreme Court of Virginia. On October 20, 1999, the Supreme Court of Virginia approved petitioner's appeal on a limited issue. In a decision dated April 21, 2000, the Supreme Court of Virginia issued an opinion on whether there was a conflict of interest between petitioner and his court appointed counsel, and whether the trial court should have inquired into the conflict when petitioner's new counsel presented the issue. In a 5 - 2 split, the Supreme Court of Virginia upheld petitioner's conviction and affirmed the Circuit Court's determination that petitioner failed to establish that his court-appointed counsel suffered from a conflict of interest. See Turner v. Commonwealth, 259 Va. 816 (2000). Furthermore, the Supreme Court of Virginia found that the "record shows that the court considered evidence and argument on the conflict of interest issue." Turner, 259 Va. at 821.

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[1] These factual assertions appear in petitioner's brief in support of his direct appeal to the Supreme Court of Virginia.

Upon exhaustion of all state remedies, petitioner filed this Petition for Writ of Habeas Corpus on October 25, 2001. The respondent replied with a Motion to Dismiss and Rule 5 Answer on November 29, 2001. Petitioner responded to the Motion to Dismiss and the issue became ripe for decision. Subsequently, this case was referred to the undersigned magistrate judge, pursuant to 28 U.S.C. §636(b)(l)(B), for a Report and Recommendation setting forth findings of fact, conclusions of law, and a recommended disposition.

APPLICABLE LAW

The Antiterrorism and Effective Death Penalty Act of 1996 prohibits federal courts from granting an application for a writ of habeas corpus with respect to any claim adjudicated on the merits in state court proceedings, unless the adjudication of the claim resulted in a decision contravening clearly established federal law or was not factually substantiated. 28 U.S.C. §2254(d). A federal reviewing court must uphold state court legal determinations unless one of the three scenarios is present: 1) the state court has arrived at a conclusion opposite to that of the Supreme Court of the United States on a point of law; 2) the state court has decided a case differently from the Supreme Court of the United States on materially indistinguishable facts; or 3) the state court has applied the correct legal principle in an unreasonable manner. See Williams v. Taylor, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). Under this analysis, if there is no directly controlling Supreme Court precedent for purposes of conducting the "contrary to" inquiry, a reviewing federal court then must analyze whether the relevant, existing precedent is applied in an objectively reasonable manner.

A federal court cannot grant relief to a habeas petitioner if the claim is procedurally defaulted. This procedural default can occur in one of two ways. The first type of procedural default occurs when a state court has expressly applied a state rule of procedural default to a substantive claim of the petitioner.

> Wainwright v. Sykes made clear that the adequate and independent state ground doctrine applies on federal habeas. 433 U.S. 72, 81, 87 (1977); See also Ulster County Court v. Allen, 442 U.S. 140, 148 (1979). Under Sykes and its progeny, an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show "cause" for the default and "prejudice attributable thereto," Murray v. Carrier, 477 U.S. 478,

> 485 (1986), or demonstrate that failure to consider the federal claim will result in a "'fundamental miscarriage of justice."' Id. at 495 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982). See also Smith v. Murray, 477 U.S. 527, 537 (1986)).

Harris v. Reed, 489 U.S. 255 (1989).

The second type of procedural default occurs when the petitioner has not presented his claim to highest court of the state in which he was convicted. When this is the case, federal courts can look to applicable state law under which the state court would have ruled. If it is clear that the claims would have been barred from review under state law, then a federal court can rule that the claim is barred from federal review without dismissing the claim to allow for exhaustion of state remedies. See Teague v. Lane, 489 U.S. 288, 297-98 (1989); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990).

One common rule of procedural default in Virginia is that claims that could have been raised at the criminal trial or on direct appeal of that conviction cannot be subsequently raised in a habeas petition. See Slayton v. Parrigan, 205 S.E.2d 680 (1974). The Fourth Circuit has determined that a procedural default on this basis is an independent and adequate ground for dismissal of the case. See Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998). Another rule of procedural default utilized by the Virginia courts is that announced in Hawks v. Cox. 211 Va. 91, 175 S.E.2d 271 (1970). According to the rule announced in Hawks, "claims raised on direct appeal will not be reconsidered by a state habeas court on collateral review." Correll v. Thompson, 63 F.3d 1279, 1289 (4th Cir. 1995). However, unlike the procedural default under Slayton, " [t]he procedural default rule established in Hawks does not prevent a federal habeas court from reviewing the claim." Id (citing Turner v. Williams, 35 F.3d 872, 890 (4th Cir. 1994)).

To prove ineffective assistance of counsel, petitioner must show: (1) that counsel's performance fell below the objective standard of reasonableness, and (2) that the alleged incompetency prejudiced the petitioner. See Strickland v. Washington, 466 U.S. 668, 687 (1984). In determining whether the representation was reasonable, the court must be "highly deferential" to counsel's performance because there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Trial strategy and tactics are accorded much deference by reviewing courts in conducting the "deficiency" analysis. Id. With regard to the second prong, prejudice means a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694.

A defendant is entitled to an attorney without conflicting interests. However, the existence of such conflicts does not necessarily violate a client's Sixth Amendment right to effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980). Petitioner may demonstrate a Sixth Amendment violation if he shows that counsel had an actual conflict of interest that adversely affected the lawyer's performance on petitioner's behalf. Id. In such a case, prejudice is presumed. Id. While neither the Supreme Court of the United States, nor the Court of Appeals for the Fourth Circuit, has determined whether or not a conflict of interest exists when an attorney is seeking employment with opposing counsel, there are several other Circuits that have decided this very issue. The Seventh Circuit has stated that

> [t]hough it is conceivable that an unprincipled defense attorney in line for a job as United States Attorney might encourage a defendant in some circumstances to plead guilty in order for counsel to curry favor with his or her future employer, that is too fanciful upon which to base a per se rule of conflict.

U.S. v. Horton, 845 F.2d 1414 (1988). The Ninth Circuit has also passed judgment on this issue and ruled that a defense counsel's planned future employment with the district attorney's office "did not create an actual conflict." Garcia v. Bunnell, 33 F.3d 193, 1199 (1994).

With respect to the impartiality of a jury, a reviewing court is only required to look at the jury members that were actually empaneled. Furthermore, "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated." Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed.2d 80 (1988). The Supreme Court reasoned that the loss of a peremptory challenge is not a violation of defendant's constitutional right to an impartial jury. The Court has "long recognized that peremptory challenges are not of constitutional dimension." See Gray v. Mississippi, 481 U.S. 648, 663, 107 S. Ct. 2045, 2054, 95 L.Ed.2d 622 (1987); Swain v. Alahama, 380 U.S 202, 219 85 S. Ct. 824, 835 13 L.Ed.2d 759 (1965); Stilson v United States, 250 U.S. 583, 586, 40 S. Ct. 28, 29, 63 L.Ed. 1154 (1919).

Peremptory challenges were created with the intent that they be available for parties to utilize without having to give reasons or be subject to the court's control. See Swain v. Alabama, 380 U.S. 202, 220, 85 S. Ct. 824, 13 L.Ed.2d 759, overruled in part by Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986). The only limitations placed upon a prosecutor's use of peremptory challenges are: 1) the strikes may not be used in a racially discriminatory fashion see Batson; and 2) they may not be used on the basis of gender, see J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L.Ed.2d 89 (1994).

> As with race-based Batson claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. Batson, 476 U.S. at 97, 106 S. Ct. at 1723. When an explanation is required, it need not rise to the level of a 'for cause" challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be

> pretextual. See Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991).

J.E.B. v. Alabama ex rel. T.B., 511 U.S. at 144-145.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DISPOSITION

1. The undersigned finds that at the time he filed this habeas petition, petitioner was in custody pursuant to his convictions under state law and that he seeks relief from the sentence imposed for his criminal conviction in the Circuit Court for Pittsylvania County, a state court located within the Western District of Virginia. Accordingly, this court has jurisdiction to adjudicate petitioner's claims under 28 U.S.C. 2254(a), and venue is proper.

2. The undersigned finds that petitioner has exhausted his state of remedies by submitting all of his present claims to the Supreme Court of Virginia, either during the direct appeal of his case or in his subsequent petition for writ of habeas corpus.

3. Petitioner's first set of claims alleges that his court appointed counsel operated under a conflict of interest that materially prejudiced petitioner during the trial of his case. According to petitioner, counsel's conflict of interest materialized when counsel submitted an application for employment as Assistant Commonwealth's Attorney under opposing counsel. This conflict resulted in counsel forgoing important arguments on petitioner's behalf so that counsel would

avoid the risk of alienating the person with whom he was seeking employment. The Supreme Court of Virginia addressed this issue during petitioner's direct appeal. Senior Justice Whiting rendered the opinion of the court holding that:

> the trial court did not abuse its discretion in concluding that Turner failed to sustain his burden of establishing that Haskins' application for employment created an impermissible conflict between Haskins' duty of loyalty to his client and his desire to obtain employment.

Turner, 259 Va. at 820.

Petitioner again raised the alleged conflict of interest with the Supreme Court of Virginia in his Petition for Writ of Habeas Corpus. In response to the habeas petition, the Supreme Court of Virginia ruled that the claims raised on direct appeal were procedurally defaulted by the rule in Hawks and that any conflict of interest claims not raised in the direct appeal were barred by operation of the rule in Slayton. See supra. The threshold question of whether a conflict existed was addressed by the Supreme Court of Virginia. While the procedural default rule of Hawks does not bar review of the claim by this court, this court must still review the petitioner's claim under the test established in Williams v Taylor See supra. Therefore this court must uphold the determination by the Supreme Court of Virginia that a conflict of interest did not exist unless 1) the state court has arrived at a conclusion opposite to that of the Supreme Court of the

United States on a point of law; 2) the state court has decided a case differently from the Supreme Court of the United States on materially indistinguishable facts; or 3) the state court has applied the correct legal principle in an unreasonable manner. Id. As indicated above, there is no Supreme Court of the United States case which is on point. Furthermore, the undersigned finds that the decision by the Supreme Court of Virginia in Turner v. Commonwealth was reasonable, especially in light of the decisions from the Seventh and Ninth Circuits. Consequently, petitioner's claims A(l) through A(5) should be dismissed with prejudice.

Petitioner argues that the trial court did not make a factual determination with respect to whether a conflict of interest existed, and thus, the determination by the Supreme Court of Virginia was made upon incorrect facts. However, the Supreme Court of Virginia clearly stated that "the trial court ruled that Haskins had no conflict of interest in his representation of Turner and that any alleged ineffective assistance of counsel should be decided in a later habeas corpus proceeding." Turner, 259 Va. at 818. This court cannot look beyond this factual determination.

4. In claim B(1), petitioner alleges that counsel was ineffective for failing to reveal the conflict of interest to petitioner before trial and for failing to remove himself from representation of the petitioner. In petitioner's state habeas petition, the Supreme Court of Virginia ruled that the claim is without merit because there was no conflict of interest. Based upon the above finding that the decision by the Supreme Court of Virginia concerning the conflict of interest was

reasonable, the undersigned finds that the decision by the Supreme Court of Virginia with respect to B(1) is also reasonable. There cannot he a duty to disclose a fact which does not exist Therefore, the undersigned finds that this claim should be dismissed.

5. Claim B(2) argues that counsel was ineffective because counsel failed to call character witnesses at the penalty phase of the jury trial. The Supreme Court of Virginia held that petitioner did not establish that counsel's failure fell below the performance standard and that petitioner did not demonstrate that he suffered prejudice because of counsel's actions, as required in the two prong Strickland test. See supra. There are conflicting facts between what petitioner alleges in his Petition for Writ of Habeas Corpus and the facts presented in the affidavit submitted by Mr. Haskins in connection with petitioner's state habeas petition. Petitioner alleges that he did not understand that character witnesses were available for the penalty stage of the trial and that he would have insisted upon their testimony had he know of their availability. Mr. Haskins' affidavit states that the decision not to call character witnesses at the penalty phase of the trial was a joint decision in which petitioner participated. Consequently, there is some question as to whether counsel's decision fell below an acceptable level of performance. However, as the term "character witness" indicates, there is no dispute as to the nature of these witnesses' contemplated testimony. Thus, there is no question of fact concerning the issue of whether petitioner was prejudiced by the failure to call character witnesses. The Supreme Court of Virginia found that petitioner was not prejudiced by

the lack of testimony from character witnesses. The question before this court is not whether this decision was right or wrong, but whether the decision was a reasonable application of the Strickland test. The undersigned finds that the decision by the Supreme Court of Virginia that petitioner did not show prejudice was reasonable and that claim B(2) should be dismissed.

6. Petitioner argues in claim B(3) that his counsel was ineffective because he failed to raise a Batson motion in response to the prosecutor's use of peremptory strikes to remove women from the jury. The Supreme Court of Virginia found this claim to lack merit. The record reveals and petitioner notes that counsel did make a Batson motion and that the trial judge overruled counsel's motion. Petitioner argues that even though counsel raised the issue before the trial judge, counsel's argument was "feeble." Writ of Petition for Habeas Corpus, p. 8. Given that counsel made the motion, the prosecutor gave non-gender based reasons, as well as the general reluctance of courts to question an attorney's reasons for using peremptory challenges, the undersigned finds that the ruling by the Supreme Court of Virginia was reasonable and that this claim should be dismissed.

7. Claim B(4) raises issue with counsel's failure to properly question and object to jurors with bias. Specifically, petitioner contends that there were three jurors, all relatives of members of the Pittsylvania County Sheriffs Department, who should have been removed from the jury panel for cause. The Supreme Court of Virginia found that this claim fails to meet

either prong of the two part Strickland test. The first juror, Carolyn Simpson, was married to the head investigative officer for the department which investigated petitioner. Counsel used a peremptory challenge to remove Mrs. Simpson from the venire. The other two jurors who petitioner alleges should have been removed for cause were Carolyn Towler and Clinton Jefferson. As indicated in the petition, the former is married to a Deputy Sheriff and the latter is the father-in-law of a Deputy Sheriff. The jurors Mrs. Towler and Mr. Jefferson did sit on the jury that convicted petitioner.

Petitioner alleges that counsel was ineffective for failing to conduct individual voir dire of the three jurors and that he should have further explored their knowledge of the case and their relatives' involvement in the case. Petitioner clearly states that Mrs. Simpson's husband had knowledge of the case. However, petitioner does not indicate what the other two jurors actually knew or what involvement their relatives had in the case. As indicated in Mr. Haskins' affidavit, the husband of Carolyn Towler was assigned to the county jail, apart from the investigating officers. There is no reference to the job description of Mr. Jefferson's son-in-law. Petitioner has failed to allege facts that would show that he suffered prejudice due to counsel's failure to more throughly question these particular jurors.

The juror Mrs. Simpson was removed from the jury panel through the use of a peremptory challenge. Petitioner alleges that using this peremptory challenge to remove a juror who should have been removed for cause, denied petitioner an impartial venire. However, petitioner does not identify other jurors for whom the peremptory challenge should have been used or what prejudices may have existed on the actual jury that convicted the petitioner. Thus, petitioner has not identified in what way he was prejudiced by losing the peremptory challenge used for Mrs. Simpson. Petitioner has also failed to show prejudice with respect to the other two jurors since there is no allegation that these jurors knew of the case or even that their relatives had information pertaining to petitioner's case. Therefore, the undersigned finds that the determination by the Supreme Court of Virginia that this claim failed to meet the prejudice prong of Strickland is reasonable and that claim B(4) should be dismissed.

8. In claim B(5), petitioner alleges that counsel was ineffective due to his failure to object to the admission of certain evidence and certain statements made by the prosecutor. Petitioner alleges counsel should have, but did not object to the prosecutor's leading questions, hearsay testimony of the witness Philip Crews, evidence of prior bad acts, irrelevant evidence, and statements made by the prosecutor solely for prejudicial effect. All of these claims were raised by the petitioner in his state habeas petition, but the Supreme Court of Virginia did not mention petitioner's allegation that counsel failed to object to hearsay testimony by the witness Crews. In regard to the issues addressed by the Supreme Court, it found that these claims fail to meet either the "performance" prong or the "prejudice" prong of the two part Strickland test. Based upon its review of the

record, the Supreme Court of Virginia determined that the statements made during the prosecutor's opening were proper, the testimony of the victim's son was relevant, and petitioner's counsel did object to the admission of petitioner's prior bad acts and questioned the witnesses on cross-examination. The undersigned finds that the dismissal by the Supreme Court of Virginia of those claims specifically addressed by the Supreme Court of Virginia was reasonable.

As to the claim raised by petitioner in his state habeas petition, but not addressed by the Supreme Court of Virginia, petitioner points to several statements made by Crews that petitioner feels counsel should have objected to as hearsay or as more prejudicial than probative. According to petitioner, Crews stated that: 1) the victim "was having lots of problems;" 2) that she felt "everything was going down hill;" 3) that "she really needed to talk to me;" 4) "she was very upset about the situation at home;" 5) "she didn't know what to do;" 6) "she told me she had already found a house;" and 7) that "she was moving". Writ for Petition of Habeas Corpus, p. 33. These statements relayed Crews' perception of the victim's mental state during the time prior to her death. The only statement that may have been considered hearsay is the statement that "she told me she had already found a house." Even if counsel had objected to this as hearsay testimony, the information probably could have been presented to the jury in the form of a different question. Thus there is no prejudice caused by counsel's failure to object. The argument that the evidence was more prejudicial than probative is subjective argument and counsel's failure to present such an argument can be considered a trial tactic and should be given great deference. Based upon an independent review of the particular statement indicated in the petition, the undersigned finds that petitioner's allegation that counsel should have objected to these statements as hearsay or as prejudicial does not support a claim under either the "performance" prong or "prejudice" prong of the Strickland two part test. Thus, the undersigned finds that claim B(5) should be dismissed in its entirety.

9. Claim B(6) alleges that petitioner was denied his right to assistance by competent counsel because counsel failed to adequately pursue a Motion to Suppress statements made by petitioner to police and evidence seized from his home. Petitioner argues that due to his level of intoxication, he was incapable of giving an intelligent waiver of his Miranda rights or to consent to the search of his home. Claim B(6) further alleges that counsel failed to adequately pursue a Motion to Limine to exclude prior bad acts from evidence presented in the case. The Supreme Court of Virginia ruled that these allegations are without merit. With respect to the suppression argument, the Supreme Court of Virginia reasoned that, according to counsel's affidavit, he did not pursue the Motion to Suppress because he had determined that the statements and evidence were likely admissible. This decision by counsel amounts to a trial tactic and should be given great deference. The Motion in Limine allegation was dismissed by the Supreme Court of Virginia based upon petitioner's failure to show that the motion would have been granted if counsel had pursued it. In other words, petitioner failed to show

prejudice due to counsel's failure to pursue the Motion in Limine. In his habeas petition before this court. petitioner makes a conclusory statement that the Motion in Limine would have been granted had counsel pursued it. Petitioner does not state on what grounds the motion would have been granted or what additional argument counsel should have made to supplement his written Motion. The undersigned finds that the analysis of the Supreme Court of Virginia with respect to the Motion to Suppress was reasonable. Furthermore, the undersigned finds that petitioner has failed to show that there was a reasonable probability that had counsel pursued the Motion in Limine further, the evidence of prior bad acts would have been excluded. The undersigned finds that claim B(6) should be dismissed.

10. Petitioner alleges in B(7) that counsel failed to make proper objections to the instructions read to the jury by the trial judge. Further, petitioner alleges that counsel should have requested a jury instruction on voluntary manslaughter and parole eligibility. In determining that this claim lacks merit, the Supreme Court of Virginia ruled that the jury instructions were supported by the evidence and were proper. In addition, the Supreme Court of Virginia found that an instruction for voluntary manslaughter was not supported by the evidence and that at the time of the trial, a parole eligibility instruction was not necessary. Based upon these rulings by the Supreme Court of Virginia, the undersigned finds that its dismissal of this claim was reasonable and that this claim should be dismissed.

11. In petitioner's last claim alleging ineffective assistance of counsel, he argues that counsel failed to properly investigate and present certain evidence, failed to properly advise petitioner, and failed to adequately prepare petitioner for trial. The first specific claim under claim B(8) alleges that counsel failed to advise petitioner that he could testify on his own behalf during the trial or during the sentencing phase. Consequently, he maintains that counsel failed to prepare petitioner for taking the witness stand. Petitioner alleges that he was prejudiced by counsel's failure in that he would have testified to the love that he had for his wife, that he had never harmed her, that he would never have intentionally harmed her, that he felt responsible for causing her death by his negligence, and that he sought forgiveness. Petition for Writ of Habeas Corpus, p. 43. The Supreme Court of Virginia found that no part of Claim B(8) met either the "performance" prong or "prejudice" prong of Strickland.

The Supreme Court of Virginia relied upon counsel's affidavit submitted in connection with petitioner's state habeas petition. In the affidavit, counsel asserted that he discussed petitioner's opportunity to testify and that petitioner agreed with counsel's decision to not put him on the stand and subject him to cross-examination. There is a conflict in the evidence between petitioner's claims and counsel's affidavit. Thus, the undersigned finds that it was not proper for the Supreme Court of Virginia to have accepted the assertions made in the affidavit over those assertions made in the habeas petition. However, the undersigned finds that the ultimate decision by the

Supreme Court of Virginia to dismiss the claim was reasonable based upon the fact that petitioner has not shown that he was prejudiced by the alleged failure of counsel.

In his affidavit, counsel asserts that all the statements that petitioner allegedly wanted to make had already been presented to the jury through the tape of petitioner's statements to the investigating officers. See Affidavit of Bryan Haskins, May 22, 2001, p. 3. This assertion can be taken as true because petitioner has not disputed this fact. Therefore, since the ideas and feeling that petitioner wanted to express to the jury had already been presented to the jury, petitioner suffered no prejudice by counsel's alleged failure to permit him to testify as to these facts

Petitioner's next claim under B(8) alleges that counsel failed to present evidence that no tests were performed to determine if there was gunshot residue on the victim's hands or if the victim's fingerprints were on the gun. The Supreme Court of Virginia noted that the medical examiner did not observe residue on the victim's hands and that counsel did argue to the jury that these tests should have been performed on the gun.

Petitioner's final claim argues that counsel should have presented evidence of defendant's blood alcohol level. The Supreme Court of Virginia dismissed this argument based on the fact that petitioner did not show that there was a reasonable probability of a different outcome, had that information been presented to the jury. Based upon the foregoing analysis of the different claims under section B(8), the undersigned finds that the ultimate decision by the Supreme Court of Virginia to dismiss petitioner's claims under B(8) was reasonable and that this claim should be dismissed in this court as well.

12. In claim C, petitioner raises the allegation that his Sixth Amendment rights were violated when he was denied an impartial jury. Petitioner contends that his constitutional right to an impartial jury was denied in two ways. First, petitioner alleges that the prosecutor improperly used his peremptory challenges to remove jurors based solely upon their sex. See J.E.B. v. Alabama ex rel. T.B. supra. Second, petitioner alleges that there were three jurors in the venire who should have been removed for cause based upon relationships they had with members of the Pittsylvania County Sheriffs Department. In response to Claim C, the Supreme Court of Virginia determined that inasmuch as petitioner raised this part of this claim on direct appeal, review is barred by the doctrine in Hawks v. Cox. See supra. As to the part of the claim not raised on direct appeal. the Supreme Court of Virginia ruled that it is barred by Slayton v. Parrigan See supra.

On direct appeal of his case to Supreme Court of Virginia, petitioner raised the Batson issue but did not allege that his convictions were as a result of biased jurors. As noted above, Slayton is an independent and adequate ground for dismissal of the case, while Hawks v. Cox is not. See Fisher v. An~elone, 163 F.3d 835 (4th Cir. 1998); and Correll v. Thompson, 63 F.3d 1279, 1289 (4th Cir. 1995). Therefore, the impartial jury portion of this claim is barred from review by this court, but the court can look beyond the procedural default with respect to the Batson claim.

In petitioner's direct appeal, the Court of Appeals of Virginia determined that the prosecutor had given adequate, non-gender reasons for striking four women from the jury panel and found that the trial judge's rejection of petitioner's Batson claim was not clearly erroneous. The Supreme Court of Virginia refused to grant a writ of certiorari on this issue. Therefore, if the decision of the Court of Appeals of Virginia was reasonable under current federal law, then petitioner's claim must be dismissed. The undersigned finds that the Court of Appeals' decision was reasonable and that petitioner's claim should be dismissed.

13. Petitioner alleges in Claim D that he was denied his right to a fair and impartial jury due to prosecutorial misconduct. The Supreme Court of Virginia held that petitioner was procedurally defaulted from raising this claim in his habeas petition because he did not raise the claim at trial or on direct appeal. See Slayton. Therefore the undersigned finds that Claim C should be dismissed.

14. Finally in Claim E, petitioner argues that he was denied his right to due process and a fair and impartial trial due to prosecutorial misconduct. Again, as in the previous claim, petitioner did not raise this claim at trial or on direct appeal. Therefore, the Supreme Court of Virginia ruled that petitioner was procedurally barred from raising this claim by the rule

in Slayton. The undersigned finds that this claim is barred here as well and should be dismissed.

15. Based upon the above findings of fact and conclusions of law, the undersigned recommends that the court grant respondent's Motion for Summary Judgment.

VIRGINIA:

In the Supreme Court of Virginia at the Supreme Court Building in the City of Richmond on Friday *the* 12th *day of* October, 2001.

Mark D. Turner,
Petitioner,

against

Director of the Department of Corrections,
Respondent.

Record No. 010831
[Entered: October 12, 2001]

Upon a Petition for a Writ of Habeas Corpus

The Court has considered the amended petition for writ of habeas corpus filed on May 10, 2001, by petitioner, and the motion to dismiss filed by the respondent.

In claim I, petitioner alleges that, because his counsel had applied in writing for a position at the Office of the Commonwealth's Attorney, who was prosecuting Turner's case, counsel had a conflict of interest that affected counsel's performance. Specifically, petitioner claims that counsel, in an effort to not "anger[] the prosecutor" and better his chances of obtaining employment with the prosecutor's office, failed to call character witnesses; failed to investigate and pursue a "Batson" motion during voir dire; failed to properly question and object to juror bias; failed to object to the prosecutor's statements and evidence; failed to pursue a motion to suppress Turner's statement to police and a motion in limine to prohibit the introduction of prior bad acts; and, failed to object to jury instructions.

The Court holds that, to the extent it was raised and decided on direct appeal in Turner v. Commonwealth, 259 Va. 816, 528 S.E.2d 112 (2000), claim I is defaulted by operation of the rule in Hawks v. Cox, 211 Va. 91, 95, 175 S.E.2d. 271. 274 (1970). To the extent that it was not raised on direct appeal, claim I is defaulted by operation of the rule in Slayton v. Parrigan. 215 Va. 27, 30, 205 S.E.2d 680, 682 (1974).

In claim II, petitioner alleges that he was denied effective assistance of counsel because counsel failed to reveal to petitioner his conflict of interest and failed to remove himself from representation of petitioner. The Court holds that this claim is without merit. This Court has already determined that petitioner did not establish a conflict of interest. Turner v. Commonwealth, 259 Va. at 819-20, 528 S.E.2d at 114-15.

Also in claim II, petitioner alleges that he was denied effective assistance of counsel because counsel failed to call character witnesses during trial and sentencing. The Court holds that petitioner fails to establish deficient performance by counsel or prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). According to the affidavit of counsel, Turner agreed with counsel's strategy of not subpoenaing character witnesses, who were present during the guilt phase of trial but who left while the jury was deliberating petitioner's guilt. According to counsel, petitioner did not wish to have the witnesses return and did not wish to call anyone remaining in the courtroom to testify at sentencing. Further, the record reveals that during argument at the penalty phase of trial, counsel referred to those in the courtroom earlier as people who supported petitioner.

Also in claim II, petitioner alleges that he was denied effective assistance of counsel because counsel failed to investigate and pursue a "Batson" motion challenging the prosecution's use of its peremptory strikes to exclude women jurors. The Court holds that this claim is without merit. The record reveals that counsel objected to the prosecutor's use of peremptory strikes to remove women from the jury, but the objection was overruled after the prosecutor enumerated satisfactory reasons for striking the women jurors.

Also in claim II, petitioner alleges that he was denied effective assistance of counsel because counsel failed to properly question or challenge jurors who had relatives in the sheriff's department. The Court holds that petitioner fails to establish deficient performance on the part of counsel or prejudice. Strickland v. Washington, 466 U.S. at 687. According to the affidavit of counsel, he did not believe that the court would strike the jurors for cause, and moving to strike them for cause would risk alienating them. Further, the jurors in question did not express partiality because of their relationship with law enforcement personnel.

Also in claim II, petitioner alleges that he was denied effective assistance of counsel because counsel failed to object to the prosecutor's comments to the jury during his opening statement regarding petitioner's job situation and drinking habits and the victim's plans to move away from petitioner; failed to object to testimony from the victim's son regarding petitioner's work, emotional state, drinking habits, and petitioner's movements immediately prior to the murder; and failed to object to evidence of prior bad acts. The Court holds that petitioner fails to establish deficient performance on the part of counsel or prejudice. Id. Upon review of the record, the Court concludes that the statements by the prosecutor during his opening statement, about which petitioner complains, were not improper. Further, because the victim's son lived with petitioner and the victim was present before and during the shooting of his mother, his testimony, opinion or otherwise, was based on what he personally observed. Finally, the record reveals that counsel objected to testimony regarding petitioner's alleged prior bad acts and challenged the testimony on cross-examination.

Also in claim II, petitioner alleges that he was denied effective assistance of counsel because counsel failed to pursue a motion to suppress petitioner's statement to police and failed to pursue a motion in limine to prohibit the introduction of prior bad acts. The Court holds that this claim is without merit. According to the affidavit of counsel, counsel filed a "broad" motion to suppress as a precautionary measure. Counsel, who reviewed the statement with petitioner, determined that petitioner's statement likely was admissible. The Court of Appeals of Virginia, in denying the petitioner's appeal, held that petitioner's statement was voluntary and this Court denied an appeal on the issue. With regard to the motion in limine, petitioner fails to establish that had counsel pursued the motion, the testimony would have been excluded.

Also in claim II, petitioner alleges that he was denied effective assistance of counsel because counsel failed to object to certain jury instructions, and failed to seek instructions on voluntary manslaughter and parole eligibility. The Court holds that this claim is without merit. It appears from the record that the instructions about which petitioner complains were supported by the evidence and appropriate. Further, a voluntary manslaughter instruction was not supported by the evidence or the defense's theory that the shooting was unintentional. Also, at the time of petitioner's trial, an instruction regarding parole eligibility was not proper.

Finally in claim II, petitioner alleges that he was denied effective assistance of counsel because counsel failed to properly prepare and interview petitioner and failed to advise petitioner that he could testify in his own defense. Petitioner also complains that counsel failed to present evidence regarding the lack of gunshot residue tests on the victim's hands or fingerprint tests on the gun, and counsel failed to present evidence of the victim's level of intoxication. The Court holds that this claim fails to establish deficient performance by counsel or prejudice. Id. According to the affidavit of counsel, counsel and petitioner extensively discussed the case. Further, the record shows that the medical examiner testified that he observed stippling only on the victim's face and neck and counsel argued to the jury that the Commonwealth failed to test the gun when it should have. Also, petitioner fails to establish that, had counsel introduced evidence of the victim's intoxication, there is a reasonable probability of a different outcome at trial.

In claim III, petitioner alleges that he was denied his right to a fair and impartial jury. The Court holds that, to the extent it was raised and decided on direct appeal, claim III is defaulted by operation of the rule in Hawks v. Cox. 211 Va. at 95, 175 S.E.2d at 274. To the extent that it was not raised on direct appeal, claim III is defaulted by operation of the rule in Slayton v. Parrigan. 215 Va. at 30, 205 S.E.2d 682.

In claim IV, petitioner alleges that he was denied his right to a fair and impartial jury because of prosecutorial misconduct. The Court holds that claim IV is defaulted because it was not raised at trial or on appeal. Id.

In claim V, petitioner alleges that he was denied a fair trial because of prosecutorial misconduct. The Court holds that claim V is defaulted because it was not raised at trial or on appeal. Id.

Accordingly, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. It is therefore ordered that the said petition be dismissed and that the respondent recover of the petitioner his costs by him expended for his defense herein.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/Deputy Clerk

Respondent's costs:

Attorney's fee	$50.00

Teste:

David B. Beach, Clerk

By: /s/Deputy Clerk

PRESENT: Carrico, C.J., Lacy, Hassell, Keenan, Koontz, and Kinser, JJ., and Whiting, Senior Justice

MARK DANA TURNER

v. Record No. 991630

COMMONWEALTH OF VIRGINIA

OPINION BY
SENIOR JUSTICE HENRY H. WHITING
[Entered: April 21, 2000]

FROM THE COURT OF APPEALS OF VIRGINIA

In this appeal of two related -criminal convictions, we consider whether the trial court's rulings on the defendant's motion for a new trial were erroneous (1) in failing to find there was a conflict of interest in defense counsel's representation of the defendant, and (2) in excluding the defendant's evidence of allegedly inadequate representation.

On January 12, 1998, Robert Bryan Haskins was appointed as counsel for Mark Dana Turner who was charged with the murder of his wife and the use of a firearm in the commission of a felony. Fourteen days before Turner's trial, Haskins applied for employment as Assistant Commonwealth's Attorney for Pittsylvania County in response to an advertisement. Haskins, who represented Turner at his trial on April 13, did not tell Turner of the application.

A jury convicted Turner of both charges and recommended sentences totaling 38 years. Eight days after the trial, Haskins told his client of the application when the Commonwealth's Attorney's office notified Haskins that he was being considered for the position. Haskins also told Turner that if he accepted the position, other counsel would have to be appointed to represent Turner.

Twelve days after the trial, Haskins was offered the position and accepted it. Two days thereafter, Haskins notified Turner of his acceptance of the job and of the necessity that other counsel be appointed to represent Turner in the sentencing and other post trial proceedings.

Prior to sentencing, Turner's new counsel filed motions to set aside the jury's verdict and for a new trial upon a number of grounds. Two of these grounds were (1) that Turner was denied the effective assistance of counsel because of an alleged conflict of interest on Haskins' part, and (2) that Haskins "significant and cumulative errors and omissions [affected Turner's] right to a fair trial with effective assistance of counsel."

After hearing and considering evidence and argument, the court denied Turner's motions to set aside the verdict. As pertinent here, the trial court ruled that Haskins had no conflict of interest in his representation of Turner and that any alleged ineffective assistance of counsel should be decided in a later habeas corpus proceeding. Following a consideration of additional evidence on the issue of sentencing, the court imposed the jury-recommended sentences.

The Court of Appeals denied Turner's petition for appeal. We granted Turner an appeal limited to the foregoing issues.

Turner premises his conflict of interest argument upon the guaranty of the Sixth Amendment to the United States Constitution to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). Turner contends that since Haskins was "actively seeking employment with the prosecutor" when the case was tried, Haskins' self interest in seeking employment conflicted with his duty of loyalty to Turner as his client. According to Turner, "[i]t is self-evident that ineffective assistance of counsel may result from an attorney's own conflict of interest." When the alleged conflict was brought to the attention of the court in Turner's motion for a new trial, Turner claims that "the trial court had a duty to make inquiry into the conflict and to determine the effect on the defendant's right to assistance of counsel." Turner thus assumes that the filing of the employment application created the conflict.

The Commonwealth responds by noting that the court considered the affidavits filed by Haskins, the Commonwealth's Attorney, and personnel in the Commonwealth's Attorney's office, as well as Haskins' testimony, all of which indicated that Haskins had no contact with the Commonwealth's Attorney's office about his application until after the trial. The Commonwealth argues that this evidence supported the court's discretionary ruling that the evidence was insufficient to conclude Haskins had a conflict of interest in his defense of Turner. We agree with the Commonwealth.

When called as a witness by Turner's new counsel in the hearing on his motion for a new trial, Haskins testified (1) that he had no conversations with the Commonwealth's Attorney about his job application until after the trial, and (2) that he never had any contact with the Commonwealth's Attorney or anyone in his office about his representation of Turner after the trial. Supporting affidavits of the Commonwealth's Attorney and personnel in his office indicate that there was no such contact.

Turner does not claim that he had any additional evidence of a conflict of interest. Rather, he argues that Haskins "admitted the conflict." We find nothing in the record to indicate that Haskins expressly admitted that there was a conflict of interest. Apparently, Turner concludes that Haskins' application for employment created the asserted conflict of interest as a matter of law.

We have not decided a case similar to this one. However, the controlling principles have been articulated in a number of cases.

The burden of establishing an alleged conflict of interest between an attorney and his client is upon the person who asserts such a conflict. Beaver v. Thompson, 93 F.3d 1186, 1192 (4th Cir. 1996) (merely showing that court-appointed defense attorney also served as a part-time assistant Commonwealth's Attorney in a neighboring county is insufficient to sustain burden of presenting convincing evidence of conflict of interest). There are conflicts of interest which are apparent on their face. Cantrell v. Commonwealth, 229 Va. 387, 393, 329 S.E.2d 22, 26 (1985) (public or private prosecutor of criminal proceeding cannot simultaneously represent victims of a crime in a civil action arising therefrom). However, an attorney's pending application for employment in opposing counsel's law firm does not create a conflict of interest on its face between the attorney and his client. United States v. Horton, 845 F.2d 1414, 1419 (7th Cir. 1988) (defense attorney's pending consideration for appointment as United States Attorney not per se conflict of interest).

Whether such conflict exists depends in part upon the evidence of contacts between the prospective employer and employee. Garcia v. Bunnell, 33 F.3d 1193, 1199 (9th Cir. 1994), cert. denied, 514 U.S. 1024 (1995). In Garcia, defense counsel's plans to begin working for the district attorney's office after the conclusion of a criminal case did not create a conflict of interest since defense counsel did not discuss the case with the district attorney's office and there was no other evidence of a conflict. Id. And, whether the evidence is sufficient to establish the conflict is a discretionary decision of the court in which the issue is raised. See Lux v. Commonwealth, 24 Va. App. 561, 569, 484 S.E.2d 145, 149 (1997) In Lux, the Commonwealth's Attorney was held to be disqualified from prosecuting a defendant's revocation of probation proceedings because there was insufficient evidence of effective screening of contacts between an assistant Commonwealth's Attorney who had formerly been the defendant's counsel and other attorneys in the Commonwealth's Attorney's office who were working on the defendant's case. Id. at 575-76, 484 S.E.2d at 152.

Applying these principles, we hold that the trial court did not abuse its discretion in concluding that Turner failed to sustain his burden of establishing that Haskins' application for employment created an impermissible conflict between Haskins' duty of loyalty to his client and his desire to obtain employment.[1] Since the court could have found from the evidence that Haskins had done nothing more than file the application, we find no merit in Turner's contention that the court erred in failing to find that there was a conflict of interest.

This brings us to the issue of the exclusion of Turner's evidence of Haskins' alleged instances of ineffective assistance of counsel at trial. Turner sought to introduce this evidence in support of his motion for a new trial. Citing Walker v. Mitchell, 224 Va. 568, 299 S.E.2d 698 (1983), the trial court refused to hear this evidence on the ground that it was admissible only in subsequent habeas corpus proceedings.

Turner contends, however, that the court failed in its duty to inquire into the conflict and to determine its effect on his right to the effective assistance of counsel. This contention assumes that there was a conflict of interest, and that the court did not inquire into that conflict. As we have noted, the record shows that the court considered evidence and argument on the conflict of interest issue. As we have already indicated, we find no error in the court's ruling that the evidence was insufficient to establish such a conflict.

---

[1] If Haskins had told his client of the application and, if the client felt that it created a conflict of interest, Haskins could have submitted the matter to the court for decision before trial. This would have avoided the risk that the court may have concluded that there was a conflict and ordered a new trial.

Accordingly, the court ruled correctly that the issues raised by Turner's claim of the ineffective assistance of counsel should be decided in habeas corpus proceedings. As we noted in Walker, "in the interests of both the Commonwealth and the accused, the ends of justice dictate the adoption of a rule restricting to habeas corpus proceedings the litigation of claims of ineffective assistance of counsel." Id. at 570, 299 S.E.2d at 699. Thus, we reject Turner's contention that the court erred in excluding his evidence of the alleged ineffective assistance of counsel. This rejection is without prejudice to Turner's right to raise these issues in a later habeas proceeding if he be so advised.

Accordingly the judgment of the trial court will be

Affirmed.

JUSTICE KOONTZ, with whom JUSTICE HASSELL joins, dissenting.

MARK DANA TURNER

v. Record No. 991630

CONNMONWEALTH OF VIRGINIA

JUSTICE KOONTZ, with whom JUSTICE HASSELL joins, dissenting.

I respectfully dissent.

"It is axiomatic that an accused, when placed upon trial for his life or liberty, is to have thrown around him every safeguard known to the law, in order that he may be afforded a fair and impartial trial." Brown v. Commonwealth, 138 Va. 807, 816, 122 S.E. 421, 424 (1924). The right to a fair and impartial trial "lies at the very basis of organized society and confidence in our judicial system." Temple v. Moses, 175 Va. 320, 336, 8 S.E.2d 262, 268 (1940); see also Cantrell v. Crews, 259 Va. 47, 50-51, 523 S.E.2d 502, 503-04 (2000)

Those trained in the law and rightfully possessing unfaltering confidence in our judicial system to afford a fair trial to a defendant, even under the unusual circumstances of this case, will understand the majority's opinion. I have no doubt, however, that those trained in the law would not knowingly choose to be tried under the same circumstances as the defendant. The line between a mere potential conflict of interest and an actual conflict here is too thin and subtle; most defendants, if not all, would seek new counsel. Those not trained in the law would be even more inclined to do so. Nevertheless, I cannot join the majority opinion because, in my view, the facts of this case clearly represent a circumstance calculated to undermine society's confidence in our judicial system.

The Commonwealth appointed Haskins as Turner's counsel. Fourteen days before trial, Haskins applied for employment with the Commonwealth's Attorney who was prosecuting Turner. Haskins knew that his application was under consideration by the Commonwealth's Attorney during Turner's trial. Nevertheless, Haskins made no disclosure of these circumstances to Turner until after the trial and before Turner was sentenced. Thus, Haskins denied Turner the opportunity to seek new counsel if he had so desired. No defendant should unknowingly be tried under such circumstances.

Undoubtedly, it would be incomprehensible to the public that a defendant's right to a fair trial was not seriously compromised in a case, such as here, where the Commonwealth appoints an attorney to represent the defendant and during the trial that attorney is actively seeking employment with the prosecuting attorney. Public confidence in the judicial system rests, at least in part, on the proposition that one's attorney has undivided loyalty. Even the appearance of a conflict of interest undermines that confidence. In short, the present case, in my view, is a "textbook" example of what should not be permitted regardless of how effectively the court-appointed attorney may represent the defendant.

Accordingly, I would hold as a matter of law that Turner was denied his right to a fair trial and that the trial court erred in not granting him a new trial.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 21st *day of* April, 2000.

Mark Dana Turner,
Appellant,

against

Commonwealth of Virginia
Appellee.

Record No. 991630
Court of Appeals No. 2916-98-3
[Entered: April 21, 2000]

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia on the 17th day of June, 1999.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of Pittsylvania County.

A Copy,

Teste:
/s/Clerk

Appellee's costs:

Printing brief	$110.40
Attorney's fee	50.00

Teste:
/s/Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Thursday *the* 17th *day of* June, 1999.

Mark Dana Turner,
Appellant,

against

Commonwealth of Virginia,
Appellee.

Record No. 2916-98-3
Circuit Court Nos. CR97001267-00 and
CR97001282 -00

[Entered: June 17, 1999]

From the Circuit Court of Pittsylvania County
Before Judge Annunziata

This petition for appeal has been reviewed pursuant to Code § 17.1-407(C), recodifying Code § 17-116.05:2(C), and is denied for the following reasons:

I. "The decision whether to disqualify a Commonwealth's attorney in a particular case is committed to the sound discretion of the trial court." Lux v. Commonwealth, 24 Va. App. 561, 569, 484 S.E.2d 145, 149 (1997)

> Although the decision to disqualify an entire Commonwealth's Attorney's office is committed to the exercise of the trial court's discretion, . . . in light of due process considerations, a final court should grant a criminal defendant's motion to disqualify when the circumstances indicate that the defendant's former counsel in a related matter has not been effectively screened from contact with the Commonwealth's attorneys who are prosecuting the defendant. In a hearing on a defendant's motion to disqualify, the defendant has the burden of proving that a member of the Commonwealth's Attorney's office counseled him on a matter related to the pending criminal case. If the defendant satisfies this burden, a presumption arises that the employees of a Commonwealth's Attorney's office share confidences with respect to matters handled by the office. The Commonwealth then must rebut this presumption by proving that the defendant's former lawyer has been effectively screened from contact with the Commonwealth's attorneys working on the defendant's case.

Id. at 575, 484 S.E.2d at 152.

The evidence proved that on March 30, 1998, appellant's former counsel, R. Bryan Haskins, submitted an application to the Commonwealth's

Attorney's Office for Pittsylvania County for a position as Assistant Commonwealth's Attorney in response to an advertisement for the position. Appellant's trial was held on Apri1 13, 1998. On April 21, 1998, based on information he obtained from the Virginia State Bar Ethics Hotline, Haskins informed appellant that he was being considered for the position and that, if he took the position, Haskins would no longer be able to represent appellant. Haskins also informed appellant that, if he took the job, he could not communicate with members of the Commonwealth's Attorney's Office regarding appellant's case. On April 25, 1998 Haskins was offered and accepted the job. On April 27, 1998, he informed appellant that he had accepted the job. On April 28, 1998, Haskins, by letter, informed the Commonwealth's Attorney's Office that he had represented appellant, and he requested that he be excluded from any contact with appellant's case. Haskins began employment with the Commonwealth's Attorney's Office on May 15, 1998.

Haskins represented by affidavit and oral testimony that he has had no contact with any employee of the Pittsylvania County Commonwealth's Attorney's Office regarding appellant's case until the week of December 4, 1998. During that week, Haskins informed the Commonwealth's Attorney that he had been subpoenaed by appellant's new counsel to testify at the December 4, 1998 hearing on this matter. Haskins also indicated that he intended to file a motion to quash the subpoena.

Prior to the December 4, 1998 hearing, the Commonwealth filed affidavits from employees of the Pittsylvania County Commonwealth's Attorney's Office, wherein each employee indicated that he or she had not communicated with Haskins regarding appellant's case. Moreover, the affidavit of the Commonwealth's Attorney indicated that files regarding appellant's case were removed from the general file shelves and were secured in the Commonwealth's Attorney's own office.

The trial judge accepted the Commonwealth's evidence, which proved that the Commonwealth utilized effective screening procedures to prevent improper contact between Haskins and the Commonwealth's Attorney. Therefore, the trial judge did not abuse his discretion in denying appellant's motion to disqualify the Commonwealth's Attorney from appellant's sentencing proceeding.

II. Appellant argues that the trial judge erred in refusing to grant appellant a new trial based on Haskins' conflict of interest and the errors made at trial. He also contends that the trial judge erred in failing to hear appellant's motion for a new trial.

Appellant's conflict of interest argument is based on the trial judge's refusal to disqualify the Commonwealth's Attorney and appoint an independent prosecutor. This issue was addressed above, and the trial judge's ruling did not deny appellant's due process rights.

Appellant's remaining arguments are framed as ineffective assistance of counsel claims. Claims of ineffective assistance of counsel may no longer be raised on direct appeal. Code § 19.2-317.1, which allowed direct appeal of such claims under certain circumstances, was repealed in 1990. 1990 Va. Acts, c. 74. See also Walker v. Mitchell, 224 Va. 568, 299 S.E.2d 698 (1983).

III. "Generally, the reasons for objecting to the grant or refusal of a jury instruction must be presented to the trial court before such objection will be considered on appeal. The objection must be made in the trial court when the instruction is tendered." Morgen Indus., Inc. v. Vaughan, 252 Va. 60, 67-68, 471 S.E.2d 489, 493 (1996). The record shows that the trial judge considered the jury instructions outside the presence of the court reporter. Thus, the proceedings are not part of the record before us. See id. at 68, 471 S.E.2d at 494. The record does not indicate that appellant objected to any of the granted jury instructions or requested a voluntary manslaughter instruction.

"No ruling of the trial court . . . will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice." Rule 5A:18. Since appellant did not preserve his objections on the record, Rule 5A:18 bars our consideration of this question on appeal. Moreover, the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18.

IV. "'[G]ender, like race, is an unconstitutional proxy for juror competence and impartiality.'" Riley v. Commonwealth, 21 Va. App. 330, 333, 464 S.E.2d 508, 509 (1995) (citation omitted).

> The opponent of a peremptory challenge must establish a prima facie case of discrimination once a prima facie case is made, the burden of production shifts to the proponent of the strike to produce a race-neutral or, as in this case, a gender-neutral explanation . . . if a neutral explanation is proffered, the trial court must then decide whether the opponent of the strike has met its burden and proved purposeful discrimination . . . .

Id.

"A 'trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal, which should be disturbed only if 'clearly erroneous.'" Barksdale v. Commonwealth, 17 Va. App. 456, 460, 438 S.E.2d 761, 763 (1993) (en banc) (citation omitted) The Commonwealth's Attorney represented to the trial judge that he struck Juror No. 9 because of a "substantial amount of problems that she has had within her own family involving a son who[m] [he] prosecuted a number of times." He elaborated that the potential juror had been "extraordinarily forgiving" of her son's conduct over the years.

The Commonwealth's Attorney stated that he struck Juror No. 17 because she indicated that she had some knowledge of the crime through her place of employment and that she may have known potential witness in the case. The Commonwealth's Attorney represented that he struck Juror No. 23 because she had served on a jury that had a difficult time reaching a verdict. He struck Juror No. 30 because she had also previously served on several juries, and one of those cases involved an extramarital relationship and an acquittal of the defendant.

The trial judge, who personally observed the entire jury panel, the challenged jurors, and the demeanor of the potential jurors, accepted the explanation that the strikes of the challenged jurors were not based upon gender considerations. The record supports the trial judge's determinations. Therefore, the trial judge's denial of appellant's Batson challenge was not clearly erroneous.

V. "On appeal, 'we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.'" Archer v. Commonwealth, 26 Va. App. 1, 11, 492 S.E.2d 826, 831 (1997) (citation omitted).

So viewed, the evidence proved that appellant and the victim, his wife, were experiencing marital difficulties. The victim's fourteen-year-old son, who lived with the couple in a trailer, testified that in the two weeks prior to the incident, appellant slept on the couch, and drank more alcohol than usual. He also stated that appellant repeatedly accused the victim of cheating on him.

On October 27, 1997, the victim told her son that she would not be surprised if she and appellant ended their relationship. She also told her son that she was looking for a new place to live. When the victim's son returned to their home at about 10:00 or 10:30 p.m., appellant was drunk. The victim's son saw appellant drink from a vodka bottle, and appellant said, "I hope you're asleep when she gets home, 'cause it ain't gonna be pretty."

The victim's son went to bed and was later awakened by sounds of "banging and tearing things up." The victim's son got out of bed, and he saw that appellant had torn the blinds from the windows and had thrown numerous items around the trailer. The victim's son returned to bed and was later awakened by the sounds of his mother and appellant arguing. He heard appellant say "something about knocking her head off." He also heard appellant say, "You want to go to the grave, me and you both? I'll take you to the grave." The victim's son then heard "a really loud bang that shook the whole trailer," and he heard appellant scream and exit the trailer. The victim had been shot in the face with a rifle. The Assistant Chief Medical Examiner testified that the muzzle of the gun was about six inches to three feet away from the victim's head when she was shot. The bullet entered the victim's head near her right eye.

The police found appellant about two tenths of a mile from the trailer sitting in the middle of the road with a rifle about six inches from his hand. Deputy Berry testified that after appellant gave the police a statement, he said, "I should have shot my fucking head off," and he asked if they could "put [him] to a quick death."

A forensic firearms expert examined the rifle and determined that it worked properly.

Two of the victim's co-workers testified that appellant twice called the victim's place of employment on the night of the shooting. In both calls, he threatened to "get" or "kick the ass" of I any man who "messed with" the victim.

In his statement to the police, appellant said that while he argued with the victim, he pointed the gun at the victim and threatened her. The victim then "shoved" the rifle, and the gun accidentally fired.

Appellant argues that the evidence was insufficient to prove that he intended to shoot and kill the victim. However, the jury was not required to accept appellant's statement that the shooting was accidental. See Rollston v. Commonwealth, 11 Va. App. 1 535, 547, 399 S.E.2d 823, 830 (1991). Moreover, from appellant's handling of the gun, coupled with his statements that he would "knock her head off" and "take her to the grave," the jury could infer beyond a reasonable doubt that appellant intended to kill the victim.

In addition, "[s]econd degree murder is defined as a 'malicious killing' of another person." Lynn v. Commonwealth, 27 Va. App. 336, 351, 499 S.E.2d 1, 8 (1998), aff'd, 257 Va. 239, ___ S.E.2d ___ (1999). "The trier of fact may infer malice from the deliberate use of a deadly weapon." Utz v. Commonwealth, 28 Va.

App. 411, 415, 505 S.E.2d 380, 382 (1998). Furthermore, appellant's flight following the commission of the crime was evidence of guilt. See Clagett v. Commonwealth, 252 Va. 79, 93, 472 S.E.2d 263, 271 (1996), cert. denied, 519 U.S. 1122 (1997). Therefore, the evidence was sufficient to prove beyond a reasonable doubt that appellant committed the charged offenses.

VI. Appellant contends that the trial judge erred in allowing certain statements made by Phillip Crews into evidence, arguing that the testimony was extremely prejudicial or was based on hearsay. However, at trial, appellant did not present these arguments to the trial judge. Rather, appellant objected to the witness' testimony on the ground that the testimony was "unresponsive."

"The Court of Appeals will not consider an argument on appeal which was not presented to the trial court." Ohree v. Commonwealth. 25 Va. App. 299, 308. 494 S.E.2d 484, 488 (1998). See Rule 5A:18. Accordingly, Rule 5A:18 bars our consideration of this question on appeal, and the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18.

VII. Appellant contends that the trial judge erred in failing to suppress statements appellant made to the police. Appellant asserts that he was arrested without a warrant and without a showing that the officer had probable cause to arrest him.

> [P]robable cause exists when the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information, alone are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed." "The test of constitutional validity is whether at the moment of arrest the arresting officer had knowledge of sufficient facts and circumstances to warrant a reasonable man in believing that an offense has been committed." To establish probable cause, the Commonwealth must show "a probability or substantial chance of criminal activity, not an actual showing of such activity."

Ford v. City of Newport News, 23 Va. App. 137, 143-44, 474 S.E.2d 848, 851 (1996) (citations omitted).

Investigator Hagerman received a call about the shooting incident at 2:22 a.m. He found appellant, the victim's spouse, sitting in the road next to a rifle at 3:26 a.m. Hagerman testified that appellant was "slumped over" and appeared to be crying. These circumstances showed a "substantial chance of criminal activity." Id. at 144, 474 S.E.2d at 851. Therefore, the warrantless arrest was not illegal.

In determining whether a statement was made voluntarily,

> "[w] e must [independently] determine whether, in light of the totality of the circumstances, including not only the details of the interrogation, but also the characteristics of the accused, the statement was the product of an essentially free and unconstrained choice by its maker, or whether the maker's will was overcome and his capacity for self-determination critically impaired."

Novak v. Commonwealth, 20 Va. App. 373, 386-87, 457 S.E.2d 402, 408 (1995) (citation omitted).

Hagerman testified that he advised appellant of his Miranda rights at 3:55 a.m. on October 28, 1997, while appellant was riding in a police car in route to the police station. Hagerman could smell alcohol on appellant's person, and he stated that appellant initially appeared to be unsteady on his feet. However, Hagerman also testified that appellant "seemed to know what he was doing." About one hour later, Hagerman re-advised appellant of his rights. Appellant acknowledged each right, and he signed a waiver of rights form. Hagerman testified that appellant was not as unsteady on his feet as he had previously been, and appellant's speech was "slightly slurred," but "easily understandable." In addition, no evidence was presented that the police threatened or coerced appellant. Therefore, the evidence proved that appellant voluntarily, knowingly, and intelligently waived his rights.

VIII. The Virginia Supreme Court has "repeatedly held that the admission of photographs in evidence rests within the sound discretion of the trial court. Walton v. Commonwealth, 256 Va. 85, 91, 501 S.E.2d 134, 138 (1998), cert. denied, 119 S. Ct. 602 (1998). The photograph depicted the wound after it was cleaned. Furthermore, the medical examiner testified that the photograph accurately depicted the victim's wound. Therefore, the trial judge did not abuse his discretion in admitting the photograph into evidence. See Joseph v. Commonwealth, 249 Va. 78, 86, 452 S.E.2d 862, 867 (1995).

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D), recodifying Code § 17-116.05:2(D), and Rule 5A:15(a). If appellant files a demand for consideration by a three-judge panel, the demand may include a statement, not to exceed one typewritten page, identifying how this order is in error.

The Commonwealth shall recover of the appellant the fees and costs to be assessed by the clerk of the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/Deputy Clerk

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF
PITTSYLVANIA COUNTY

Hearing Date: **December 4, 1998**
Judge: **Charles J. Strauss**

COMMONWEALTH OF VIRGINIA

v.

Mark Dana Turner, DEFENDANT

[Entered: December 7, 1998]

These cases came before the Court for sentencing of the defendant, who appeared in person with his attorney, **Glenn L. Berger**. The Commonwealth was represented by **David N. Grimes**.

On **April 13, 1998**, the defendant was found guilty of the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CR97001267-00	**Second Degree Murder (F)**	**10/28/97**	**18.2-32**
CR97001282-00	**Use of Firearm while Committing Murder (F)**	**10/28/97**	**48.2-53.1**

The Attorney for the Commonwealth moved the Court to Quash Subpoena Duces Tecum, which motion the Court granted.

Counsel for the defendant moved the Court to disqualify the Commonwealth's Attorney and his office and to appoint a special prosecutor to conclude the remaining motions and issues pending in this case, which motion the Court denied, and exception was noted.

Counsel for the defendant moved the Court to Set Aside the jury verdict and to grant the defendant a new trial, which motions the Court denied, and exception was noted.

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code § 19.2-299.

Pursuant to the provisions of Code § 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, the Court finds the defendant

Guilty of **SECOND DEGREE MURDER** and **USE OF FIREARM WHILE COMMITTING MURDER.**

The Court **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of: **35 years** for **Second Degree Murder,** and **3 years** for **Use of Firearm while Committing Murder,** the sentence the jurors in their verdict ascertained. The total sentence imposed is **38 years.**

These sentences shall run consecutively with all other sentences.

Costs. The defendant shall pay costs of approximately **$3260.00,** plus attorney fees within 12 months from the date of his release from confinement.

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

Right appeal. After pronouncing sentence the Court advised the defendant of his right to appeal the conviction(s).

12/7/98 ENTER: /s/Charles J. Strauss
DATE JUDGE

DEFENDANT IDENTIFICATION:

SSN: **224-78-4168** DOB: **05/31/68** Sex: **Male**

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED:	**38 years**
TOTAL SENTENCE SUSPENDED:	**0**

cll

VIRGINIA:

IN THE CIRCUIT COURT OF
PITTSYLVANIA COUNTY

COMMONWEALTH OF VIRGINIA,)
)
v.) TRANSCRIPT
)
MARK DANA TURNER.)

****

The following constitutes a transcript of all the oral testimony and other incidents of a Sentencing Hearing in the above styled cases, before the HONORABLE CHARLES J. STRAUSS, Judge of the Circuit Court of Pittsylvania County, Virginia, on December 4, 1998, wherein the defendant was Sentenced for Murder and Use of a Firearm in the Commission of Murder, all of which were duly electronically recorded.

****

APPEARANCES:

MR. DAVID N. GRIMES,
For the Commonwealth

MR. GLENN L. BERGER,
Counsel for the Defendant,
Mark Dana Turner

MARK DANA TURNER,
The Defendant, In Person

witnesses that were relevant to a legitimate matter of inquiry for the Court in defense of the defendant, and if it's correct and we don't have the authority to request a subpoena and only the Commonwealth's Attorney could request a subpoena, we submit that that Rule would violate the Constitution, and we submit that testimony given in this case is not, the purpose of this Rule is to protect the confidentiality of the relationship between the attorney and the client and not to prohibit from presenting information to the Court where the client is represented by counsel and wishes to produce that evidence.

THE COURT: Alright. Mr. Grimes, do you have any response to that?

MR. GRIMES: Your Honor, the Motion that's before the Court at this point to disqualify my office, I assume to be limited to a claim that there may some present conflict of interest question, and I certainly don't object to that inquiry being made. We have filed Affidavits to show that I believe we have effectively isolated Mr. Haskins from any contact with the case since his employment, and also isolated, well actually in both directions, the employees of my office and myself have not communicated with him with very limited exception of the procedural matters that bring us here today. His receiving the subpoena was discussed, but the concern that the Commonwealth has at this point though is that the defense has made it clear that it intends to, I believe, circumvent the order and system of law that we have regarding post-conviction remedies and claims of ineffective assistance.

THE COURT: Okay, let me just stop you there. I think the only thing we're dealing with at this point is the Motion to...

MR. BERGER: That's correct.

THE COURT: Okay, have a special prosecutor appointed in lieu of Mr. Grimes' office. Okay. We haven't gotten to that one yet, but...

MR. GRIMES: Yes sir. I just wanted to make sure we are limiting, in fairness to all parties here, including the Commonwealth, the defendant, and Mr. Haskins, that we're not inquiring into things of that nature at this stage of the proceedings.

THE COURT: Alright. Gentlemen, let me tell you that my interpretation of Rule 3A:12 is that it does not apply to this particular case. It appears that the intent of that Statute may have been to in some way protect the defense attorneys from being called to Grand Juries, or in cases like this by the Commonwealth, and I don't believe it applies to this case. So, that's going to be my interpretation today, anyway, unless I'm convinced otherwise. So, alright, Mr. Berger, I think with that, what you've said, and the understanding that we're just proceeding on this one Motion, I'll allow you to go ahead and make inquiry of Mr. Haskins.

DIRECT EXAMINATION (CONT.)

By Mr. Berger:

Q. You're R. Bryan Haskins?

A. Yes.

Q. And you're an attorney, licensed to practice law in the State of Virginia?

A. Yes I am.

Q. And were you the trial counsel for Mark Dana Turner at the trial of the charges pending before this Court?

A. I was.

Q. And I believe that trial occurred on April the 13th, 1998?

A. That's correct.

Q. Prior to that, did you on March 30th, 1998, apply for a job as Assistant Commonwealth's Attorney in the Commonwealth's Attorney's Office of Pittsylvania County with David Grimes?

A. Yes sir, I did.

Q. Did you file a written application?

A. Yes sir, in the form of a letter expressing a desire to seek the position that was offered in the Virginia Lawyers' Weekly, and also a Resume.

Q. And did you have a conversation with David Grimes about the position?

A. On what date?

Q. At any time?

A. Yes.

Q. Okay. Did you do that on March 30th?

A. No sir. Mr. Grimes was at a conference, I believe their spring annual conference.

Q. When did you first have a conversation with him about employment?

A. After Mr. Turner's trial.

Q. So you're saying you never had an actual face to face conversation with him about it prior to the trial?

A. That's correct.

Q. Alright. Did you, was it, in fact, David Grimes' discretion and authority to make the sole decision as to whether to hire you or not?

A. That was my understanding.

Q. Okay. Is it your understanding now that it was his decision to hire you?

A. Yes.

Q. Okay, and he, in fact, did hire you, is that correct?

A. That is correct.

Q. And did you disclose your interest in the job as an Assistant Commonwealth's Attorney working for David Grimes to Mark Dana Turner prior to the trial?

A. No sir, I did not.

Q. How long after the trial did you actually accept the position?

A. The position, I believe, was offered to me on April 25th. That's when I had my first meeting with Mr. Grimes about the matter.

Q. You accepted it that day?

A. Yes.

MR. BERGER: That's all the questions I have on this issue.

THE COURT: Alright, Mr. Grimes, any questions?

MR. GRIMES: Judge, I would like to clarify one point through a question.

CROSS EXAMINATION

By Mr. Grimes:

Q. Mr. Haskins, at some point after your submission of your letter of interest, did I advise you that an interview would not be necessary in light of my practice experience with you?

A. Yes sir.

Q. Was there any other discussion about the position or your eligibility for it, other than that until after the trial?

A. No sir. In fact, I do not believe that you spoke to me or initiated an inquiry as to whether or not you wished to interview me or had any desire one way or the other to hire me until after the trial, and it was at that point that I had already previously contacted the Virginia State Bar's Ethical Hotline to ask them what my duties were towards my client, and they indicated to me that I was required to notify my client if I was informed at any time by Mr. Grimes that I was going to be given consideration in the form of an interview, or that I was being informed that they were looking very closely at me. Subsequent to the trial Mr. Jarvis actually spoke to me, who was at that time, Mr. Grimes' Assistant, and indicated to me that Mr. Grimes had expressed some interest in talking to me about the matter. At that point I went physically to the jail and met with Mark Turner, and I believe, one other client on that day, Dennis Daniel, and spoke with them about this matter, and explained to them all their options should I be offered the job and should I accept it. And when was that communication from Mr. Jarvis?

A. It was the Friday before I went to see Mr. Turner. I believe I saw him either on a Monday or a Tuesday. April 21st was the exact date that I went to see him, as noted in my Affidavit.

MR. GRIMES: No further questions.

THE COURT: Alright, thank you.

MR. BERGER: A couple questions.

REDIRECT EXAMINATION

By Mr. Berger:

Q. In your Affidavit you made mention to, you indicated there had been no contact. Actually there has been some contact with the Commonwealth's Attorney about this case, is that correct?

A. Yes sir.

Q. And he's asked you questions, has he questioned you about whether you have had contact with his new counsel?

A. No sir, he has not.

Q. Okay. Has he, did he question you about or discuss with you filing motions to quash this subpoena?

A. No sir, he did not. If I may state, I did this on my own, on my own personal laptop at home. I felt that I had an ethical duty to do this. I have not informed Mr. Grimes what the nature of my objection was. My sole discussion with him about this incident was he asked me had. I received a subpoena, and I told him yes, and I told him that I would be objecting to the subpoena.

Q. So you're saying you didn't discuss this at all with him, that you were going to file a Motion to Quash?

A. No sir, I didn't. I told him that I would have an objection to it, as I told you yesterday, and I told Mr. Grimes this yesterday as well. I filed the Motion this morning with Ms. Fuller, providing Mr. Grimes a copy, and then provided you a copy.

MR. BERGER: That's all the questions I have.

THE COURT: Alright, thank you. You may step down.

MR. GRIMES: Judge, I also feel compelled to clarify a little bit.

THE COURT: Alright.

RECROSS EXAMINATION

By Mr. Grimes:

Q. Was all of this discussion during this calendar week with December 4th being the Friday?

A. Yes sir.

Q. Did you inform me of the Rule under which you were going to challenge your subpoena?

A. Yes sir, I mentioned that, that I was going to challenge the subpoena, and I told you that I was looking at Rule 3A:12.

Q. And did I inquire of you this week about whether you had been informed of the reason for your appearance by counsel?

A. Yes sir.

MR. GRIMES: No further questions.

A. These discussions, if I may clarify, originated Tuesday afternoon. I received a subpoena on Tuesday of this week, and that was the first notice that I had that this trial was even, or this hearing was even set.

THE COURT: Alright, anything else?

MR. GRIMES: No sir.

THE COURT: Alright, thank you. You may step down. Mr. Berger, anything else?

MR. BERGER: Your Honor, we submit that the conflict of interest may have existed at the time of trial. We submit that that conflict of interest if it existed then, continues over until today, even if he wasn't hired.

THE COURT: Alright, let me just stop you. There's no more evidence you want to put on, is that correct?

MR. BERGER: Not on my motion to have them disqualified.

THE COURT: Alright. Mr. Grimes, is there any other evidence you want to put on, on this Motion?

MR. GRIMES: No sir, Your Honor, other than the Affidavits I submitted yesterday.

THE COURT: Alright.

MR. GRIMES: There are also, because of the late notice of the Motion, my third assistant, Cindy Cummings, is out of the office. I would ask an opportunity to add to the record, her Affidavit, which is virtually identical to that of Mr. Hurt, that it would reflect the same isolation of her from the conduct with Mr. Haskins about this case, but that's the only evidence from the Commonwealth.

THE COURT: Alright. Go ahead, Mr. Berger.

MR. BERGER: Although this Motion is separate from the subsequent Motion, it is related to the other Motion that counsel has made concerning a conflict of interest, and we submit that a conflict of interest existed then, that's not cured by building the Chinese wall afterwards. We submit that second, there is a conflict of interest that occurs now because he works in the office. Now, the case of, there are several cases dealing with building a Chinese wall that would protect from a conflict going forward to prevent the later conflict, but we submit that to protect from the earlier conflict you can't build a Chinese wall around something that's already occurred. We also submit that the factors involving the conflict of interest and the Sixth Amendment Right to counsel will necessitate calling Mr. Haskins as a witness on some of those issues, that the cross examination of him by his employer in those cases is difficult. We can, I could point out to the Court exactly what we've seen here today, and I'm not impugning the integrity of Mr. Grimes or Mr. Haskins, but Mr. Haskins asked, was asked one question, the best I knew how to answer it, trying to get the answer, he doesn't say that there was any contact. Mr. Grimes, in trying to clarify the question, asks a leading question, and elicits from Mr. Haskins the very answer that I solicited, and we submit that there is a, there is a, a both a real and an apparent conflict when your boss asks you questions as opposed to another equally qualified prosecutor who sits there, who does the job, but is not this man's boss, and we submit that the defendant is entitled to a prosecutor who has dependent discretion and judgment, and is not affected by either protecting his employer or the witness who may be in a different situation here where he is answering questions of his employer as opposed to another Commonwealth's Attorney, and we ask the Court consideration.

THE COURT: Mr. Berger, just for the purposes of this hearing today, we're here for sentencing. Mr. Haskins is not involved in the sentencing, so your argument about questioning Mr. Haskins only applies to the issues you raise concerning a Motion for a new trial on the grounds that, basically that Mr. Turner had ineffective assistance of counsel. Short of that, and that's assuming that you'll get to have that hearing.

MR. BERGER: Yes sir.

THE COURT: Okay. Mr. Grimes, any response you want to make?

MR. GRIMES: Your Honor, Mr. Berger alluded to case law, but cited none. The leading case in Virginia is Lux, L-u-x v. Commonwealth, 24 Va. App. 561. That refers to a situation where a Public Defender is hired and the question was whether it disqualified the Commonwealth's Attorney's Office from prosecuting a motion to revoke a suspended sentence on a case in which the same person had defended the defendant. It was then a case of first impression of the Commonwealth. It has since been resolved by that case and subsequent cases, and it has indicated that it's a matter for the sound discretion of the Court. The only question that Mr. Berger brings up today is of his own creation and staging today. He summons Mr.

Haskins here, and very clearly asks him nothing that's not already covered by the Affidavits. He's not done anything except to try and create a situation where he claims it would be a conflict. The other matters we'll get to, but obviously if we're talking about the substantive questions of ineffective assistance, that's exactly why there is another proceeding, a habeas proceeding where the local Commonwealth's Attorney does not appear, but the Attorney General does, where the attorney in question can have his own representation, where the defense can approach in the civil proceeding from which both can appeal. Obviously if we try to do habeas things right on top of trials we would have a mess and apparently our legislature sorted those issues out long ago for us.

THE COURT: Thank you.

MR. BERGER: Your Honor, discussing the law a bin, Lux discusses that there are majority and minority opinions throughout the country. Virginia chose to go with the majority and to say that there would not be per se rule of disqualifying prosecution, yes it is in the discretion of the Court. I would cite to the Court the case of Macon v. Commonwealth, 187 Va. 363, and also the case of Durrette v. Commonwealth, 201 Va. 735. Those cases deal with cases where a Commonwealth's Attorney will be a material witness, and in those cases the Court says that the prosecutor should retire from the case and let another be appointed to prosecute. If you read Lux it also seems to indicate that the due process is a different test than the ethical considerations, that the ethical considerations and the ethical opinions say that you maybe should not go forward, that due process is a more difficult test for the defendant to occur, for the Court to step in and remove someone. However, we submit to the Court that the case of Cuyler v. Sullivan, 446 U.S. 335, and Dowell v. Commonwealth, 323 Va. App. 555, 1987 case, both say that if a possibility of a conflict is apparent the trial court has a duty to conduct further inquiry to see if an actual conflict exists. Cuyler says that the Sixth Amendment requires that. It's our position that this is a conflict of interest situation, that the Court does have a duty to look at a conflict of interest situation and determine as to whether or not it exists. Whether it then goes further to say that that conflict of interest is sufficient to be ineffective assistance of counsel is a second test, but we submit the initial, as to whether or not there was a conflict is important for the Court to look at, and if there is a Sixth Amendment conflict of interest, whether that is material enough to give a new trial is based on whether or not it was ineffective assistance of counsel, and we submit that we're not trying to create an issue here. The issue was created for us and dropped in our lap.

THE COURT: Alright. With regard to that Motion the, really it's two, divided into two issues. One was a conflict that counsel argues was created by the application of Mr. Haskins to the Commonwealth Attorney's Office prior to the trial of this matter. That is something that guess is beyond the scope of this Court at this time. If there was a duty, there's no evidence that in any way the defendant was harmed by or did not receive fair representation because of that. There just is simply no evidence for the Court to go back, and it has no bearing on today's case in terms of the sentencing. In terms of today's case the Affidavits indicate that apparently there's been no communications between Mr. Haskins and the Commonwealth concerning this case, and that apparently an effective Chinese wall has been created in the office, and I just don't find the conflict or the necessity to appoint a special prosecutor for today's sentencing. So, I'll deny your Motion on that. Alright, with regard to the second motion, Mr. Berger, you have filed a Motion, a second Motion which claims is, of ineffective assistance of counsel, and requesting a new trial. Mr. Grimes has filed a letter Memorandum with a case supporting it, and I've reviewed that Memorandum, and of course this supports how I felt about this matter, but I'll be glad to hear you on that and any additional information or evidence you want to present as to why the Court should hear that Motion, not...

MR. BERGER: Alright.

THE COURT: Alright.

MR. BERGER: Your Honor, I would cite first to the Cuyler v. Sullivan, 446 U.S. 335, a 1980 Court, the case of Cuyler case, and the Court states there the Sixth Amendment requires a state trial court to investigate timely objections to multiple representation, but unless the state trial court knows or reasonably should know that a particular conflict exists, the Court itself need not initiate an inquiry into the propriety of multiple representation. What that case says, holds, and that's dealing with multiple representation, which is a different issue but it is a Sixth Amendment issue as to whether or not a conflict of interest exists. It says that once the Court has knowledge of that conflict of interest or a basis where the Court should know of a conflict of interest, the Court has an affirmative duty of going forward, of investigating that conflict to determine whether or not a conflict exists. The case of Powell v. Commonwealth, Dowell v. Commonwealth, I'm sorry, D-o-w-e-l-l, 3 Va. App. 555, quoting on from that, it says however, "if an objection is made to multiple representation or if the possibility of a conflict of interest is apparent, a trial court has a duty to conduct further inquiry to determine if an actual conflict exists", and they cite Wood v. Georgia, 450 U.S. 261, 1981 case. It says, either one of those cases, if there's a multiple representation or if a possibility of a conflict of interest exists. It goes on and says, "However, where a trial court fails to initiate an inquiry when it knows or reasonably should know that a particular conflict may exist it is presumed that a conflict resulted in ineffective assistance of counsel." So we submit that Virginia has shown in that case a following of the Cuyler decision, and that the Court does have a responsibility. Following that case in 1989, is the Hill case that Mr. Grimes cites. The Hill case, the majority opinion does say that the Court, it is not error for the Court to fail to do so, to look into ineffective assistance of counsel. However, I would submit to the Court that there were three Justices who dissented in that case and we would submit that the dissent in the case makes a lot more sense than the majority opinion. I would like to read from that dissent. "There is no practical difference between a pre-trial motion alleging ineffective assistance of counsel than a post-trial motion doing so. If a defense attorneys moves, before trial, to withdraw as counsel because of a conflict of interest, and the trial judge denies the motion, the ruling is subject to review on direct appeal. If the attorney does not make such a pre-trial motion and, after conviction, the defendant obtains another attorney who then asserts ineffective assistance of counsel because of the trial attorney's conflict of interest, the issue should be considered and reviewed in the same a, proceeding without resort to separate habeas corpus action. They go on to discuss that there is no prohibition against the Court of making this inquiry, and I would submit that the Court is not required to do so, but it's within the Court's discretion. We submit that fundamental fairness of our system, is not to delay things, not to delay justice, not to delay making findings, not to say you've got to hire another lawyer, you've got to go through another proceeding, we're not going to let you determine whether you had a fair trial here. We submit that the issues are before this Court, they're fairly before this Court, they're timely before this Court. The information is fresh in everyone's memory at this point. There are witnesses here to testify there today who were, one of our issues is that there was significant evidence available for trial that was not used. That information is here. These witnesses' memories are fresh. We submit that justice will best be served by the Court allowing this evidence to be produced, and allowing the Court to make a record, and make a determination as to whether or not the defendant received a fair trial, and whether or not the Court should grant him a new trial or allow this conviction to stand. Thank you, Your Honor.

THE COURT: Alright, Mr. Grimes?

MR. GRIMES: Your Honor, we all got very late notice of this, although Mr. Berger's been in the case since May. We received the Motion to set aside for ineffective assistance grounds within the last several days. We received the motion to disqualify within the last seventy-two hours, but even a cursory examination of the case law available in Virginia, and that's really all that I've had time to prepare, shows us a pretty clear history and pretty clear pattern of what our Commonwealth and legislature and the courts has done with this issue. It is a question of balancing and a question of fairness, and at least in the Commonwealth of Virginia there has been a balance drawn that not only recognizes the rights of the criminal who's been convicted, but also recognizes the interest of the Commonwealth and its case, the interest of the victims in its case, and their case, and the interests of the attorney who happened to represent the defendant at the trial and no longer represents him in the other issues. In Hill, the one thing I'd like to point out on Hill, Hill was a case that was decided within that window between 1985 and 1990 where the Code Section 19.2-317.1 existed, and that's critically important to understanding Hill, because at that time specifically by Statute the legislature had authorized a direct appeal of ineffective assistance issues so long as the whole record showed. That would certainly explain the motivation for the dissenting opinions to say a full record should be developed in order to give meaning to 317, and I believe they said that in their dissents, that hasn't been pointed out in argument, that much of the dissent was based on the existence of that Code Section, and that it was meaningless unless there was a post-trial hearing to flush out those issues, but even in the face of that Statute, our appeals courts said that it was not error to deny such a post-trial hearing. Hill had filed a post-trial motion claiming about twenty different incidents of ineffective assistance, one to put on substantial other evidence. The Court referred back to Walker v. Mitchell, and in my letter, I won't retread everything that I've gone over in the letter opinion and I apologize for it's lateness. I did it last night and got it to the Court overnight, and Mr. Berger last night, but the Walker case we would submit was the law before the Code Section was enacted, and remains the law after the Code Section has been repealed, and what it essentially says is that there may not be an ideal way to do this but the most fair way to do this is to look to what we have in terms of statutory habeas relief versus post-trial pre-sentencing remedies. The legislature set up a habeas corpus proceeding that allows the defendant to make all of these challenges later, and at that time all parties are fairly given notice, and that's critical, and what they're attempting to do here is whether he's my assistant or not, Mr. Haskins, who formerly represented this man, is expected to show up with virtually no notice, having been served with a subpoena three days ago, sit up here in some inquisition fashion and answer to whatever decision he may have made during the trial and whether it was a good decision or bad decision or effective or ineffective, with no notice to him. Part of the habeas proceeding is to protect him by requiring a formal filing of habeas as a suit, to allow him an opportunity to answer it, to be represented if he chooses, and the other is to give the Commonwealth, not just the locality Commonwealth, but the Commonwealth of Virginia notice of the filing so that it may answer and either remedy an error that was committed below or stand up for the conviction that was entered by having the opportunity for the Attorney General to appear after getting notice, and the ability to martial its resources and its evidence for a case, and the defendant, the person who is then a convicted person, could give him every opportunity to prepare and come in, in front of a neutral tribunal that hasn't necessarily had any involvement in the case up to that point, to look at those issues carefully, deliberatively and to make a fair decision for all involved. Walker is clear that the defendant having that remedy just does not have the right to require after trial and before sentencing, to have the trial court go through that process because it is unfair. It allows for questions to be raised without the opportunity to prepare an answer, and obviously in a trial setting there are many things that would require research and review of notes, or review of others with whom it may have been discussed, if he had a former law partner, and frankly in a habeas proceeding it would be, even if the Statute provided it, and I think there is a limited provision where the Commonwealth's Attorney can appear in those, but it is generally a bad idea for the prosecutor who prosecuted the case to then handled the habeas proceeding because of those issues as well. We would submit that the clear import of the Walker case, subsequent case law, the legislative review of, and then the repeal in 1990 of that Code Section providing for direct appeal of ineffective assistance issues, makes it clear that the Courts and the legislature in Virginia agree that these are issues to be taken up as a separate proceeding, as a civil proceeding. There are two I points about that also, that this setting makes it possible to regard, there is what's called the Slayton Rule, and I'm not sure to what degree the defendant or his attorney at this setting or this stage have considered it, but as I understand the Slayton Rule, in a habeas corpus proceeding, the habeas courts will not take notice of issues that the defendant could have raised at the trial level. If we said at this point that the defendant could raise all the issues having to do with ineffective assistance, that his habeas relief on the other end would be meaningless, it would be gutted. The other aspect of it is that a habeas proceeding is a civil proceeding, it's a civil attack on a criminal judgment, and there is an important Constitutional issue involved in that as well, and that is that if the Circuit Court reviewing a case in a habeas corpus proceeding sides with the defendant, the convicted criminal, the Commonwealth then has a right to appeal. If the Court today reviewed this question, said I found that he was ineffectively represented, and denied due process, we would have no right to an appeal, and we would submit that our Constitution in order to set up legislation, specifically carves out the right for the Commonwealth to have the appeals courts review those things that are effectively habeas relief and we ask the Court to help us in guarding that right of the Commonwealth and the victims of the case have as well.

THE COURT: Thank you, Mr. Grimes. Mr. Berger, anything else?

MR. BERGER: Your Honor, I'd like to set the record straight. Mr. Grimes indicates that the case has been since May. He's well aware that we got our copy of the transcript of this case Monday of this week, November the 30th. There's an Order in the Court's file that we had twenty-one days from receipt of the transcript to actually file any objections to the conviction based on the transcript, so I did receive a rough draft of it about two weeks ago that I had for two days to look over. I had been expecting to get the original but did not until Monday of this week, and actually discussed with the Court yesterday, a continuance, have not made a formal motion for a continuance in the matter, trying to go forward, so I would like to clarify the record when he indicates that these are, indicating intentionally late filed motions, and we would submit that that's not the case. This Court is in best position to make the best and the fairest decision as to whether or not this defendant receives a new trial. This Court tried the case. It tried it recently in its own mind. The Court knows the facts that it observed. The Court could most easily take the new facts that the Court looks and see what effect they may have had in the trial of this case. The delay of this process, of taking it to some other form we submit does not make it fairer or better, but detracts from justice.

THE COURT: Alright. The procedure that the Court is familiar with in dealing with ineffective assistance of counsel is the habeas corpus procedure, and I agree with the position of the majority, which would require that process to be filed rather than proceeding with a determination of whether the attorney represented the defendant well, some time post-trial or at sentencing time. That process, I believe would create chaos in our system. I agree with the Walker decision where they say that it brings in a tangential and is in the form of a collateral attack, confuses the issues, where we're trying to direct our attention toward a fact finding mission of the guilt or innocence of the accused. That is not a claim that the defendant is innocent or guilty, but only that somehow the attorney representing the individual didn't effectively present his defense in evidence that may or may not have been presented, decisions that attorney made about how to handle that case in the defense of the defendant, and that is a matter that is more properly taken up in a habeas proceeding where the issues are clear, the parties are clear. In a normal habeas proceeding the Commonwealth is represented. The defendant is represented, and the attorney who is charged with having been ineffective has a right of representation. To try to inject that process into the procedure at this point would simply create, I believe, chaos in the system, that we need to keep orderly and allow things to proceed in a fashion that has been created, already previously created, and clearly that's probably why the legislature ultimately decided that the Statute they had enacted to allow that, Sect. 19.2-317.1, should be revoked, because of the difficulties it created in going, proceeding in criminal cases and then being allowed to bring in collateral attacks of ineffective assistance of counsel, along, and confuse that with issues of guilt or innocence. So, Mr. Berger, while can understand some of your position, I can't agree with it. So, at this point I am going to deny your motion. Alright, let's proceed with the sentencing. Mr. Berger, you had some questions that you wanted to ask of the probation officer?

MR. BERGER: Yes, Your Honor. Your Honor, could I put a few things on the record on my Motion, very quickly?

THE COURT: Alright, go ahead.

MR. BERGER: Your Honor, I filed a Motion. In that Motion I cited a number of instances that we felt were ineffective assistance of counsel. I would like to add to that for the record some other objections that were not done. There was not a voluntary manslaughter instruction given. It would be the defendant's position that that was justified under the evidence and should have been given. There was no objection to the malice instructions and the unlawful killing inference there, that those instructions improperly infer malice, that there was no definition of unlawful killing given, that the instruction dealing with first degree to second degree murder.

THE COURT: Mr. Berger, this is not, this is actually an additional, are you claiming this under the ineffective assistance of counsel?

MR. BERGER: Yes sir.

THE COURT: Alright, go ahead.

MR. BERGER: The Court has denied me the right, I guess to present the Motion. All I want to do is at least put on the record what my evidence, make a proffer as to what my evidence would have been.

THE COURT: Well, that's not in your Motion, counsel. That's what I'm saying. Now you're adding to your Motion that you previously filed. I mean, you're asking, you've presented your Motion. Now the Court's denied the Motion. Now you want to tag something onto the Motion. That's not in your Motion.

MR. BERGER: No sir, but it is in the record, and it would be evidence that we would present to the Court today to show what we believe is ineffective assistance.

THE COURT: Well, Mr. Berger, that sounds like, what you're reading now is something that would be subject of appeal. You take it up on appeal. If there's anything, the Court has denied your Motion. What you're talking about now may be subject matter for appeal, but you've presented what you want the Court to consider. I've considered it, and I've denied your Motion. So let's proceed with the sentencing.

MR. BERGER: As I understand the Court will not allow me to at least make a record?

THE COURT: I'm not going to allow you to now to your Motion what you've already filed, counsel. That was filed. You're now trying to add additional factors to the Motion that the Court, after the Court's already ruled on the Motion, and I'm not going to allow you now to try to come back in and expand your Motion. I've ruled on it. If you, you know, you haven't asked to amend your Motion. The Court's ruled on it, and now you want to come back in and expand your Motion. I'm not going to allow you to do that.

MR. BERGER: I guess this is a proffer of what my evidence would be of ineffective assistance of counsel, which was the essence of my Motion. I agree there was some additional specifics here. Alright.

THE COURT: Your Motion sets out a lengthy list of items that you claim that the defendant, the defense attorney, previous defense attorney failed to do.

MR. BERGER: Yes sir.

THE COURT: Those are not among that list.

MR. BERGER: That's correct.

THECOURT: That I recall.

MR.BERGER: That's correct.

THE COURT: Alright. Seems to me I've ruled on it and now you want to expand that list, now that I've ruled.

MR.BERGER: Well, as I understand the Court's ruling is, that I'm not allowed to put on, no matter what my evidence was, I wouldn't be able to put on any evidence because a Sixth Amendment violation can not be brought to the Court's attention at this stage, and I accept the Court's ruling on that. All I'm saying is, if the Court would allow me to go into my Motion, these would be factors that I would point out to the Court to substantiate our Motion that his Sixth Amendment Right was denied.

THE COURT: That's not my interpretation of what you're doing, counsel. You're adding to your list of ineffective assistance, which you've already filed a lengthy list of, so at this point it simply comes too late, and I'm going to deny it. So, let's proceed with sentencing.

MR. BERGER: Alright. Your Honor, there is a Motion before the Court to set aside the verdict as contrary to the law and the evidence.

THE COURT: Alright, is there any further argument you want to make on that?

MR. BERGER: Yes sir.

THE COURT: Alright.

MR. BERGER: Your Honor, although we would submit that there were numerous errors made at trial, many of those were not objected to by counsel, and therefore are not subject to the Motion to set aside as contrary to the law and the evidence at this stage. However, would the, if the Court would consider those issues, we would cite to the Court all of the list of items that we have put in our Motion concerning ineffective assistance of counsel, along with objections, that the case should be set aside, that the instructions were not properly given, which even without counsel's objection we submit that the Court has a responsibility to properly instruct the jury. We would submit that the voluntary manslaughter instruction should have been given under the facts of this case. We would

VIRGINIA: IN THE CIRCUIT COURT FOR THE
COUNTY OF PITTSYLVANIA

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

MARK DANA TURNER,
Defendant.

CASE NUMBERS: CR97001267-00
CR97001282-00

MOTION

TO THE HONORABLE JUDGE OF THIS COURT:

Comes now the Defendant, **MARK DANA TURNER**, and moves this Court to disqualify the Commonwealth's Attorney from further prosecution of this case and to appoint a special prosecutor and in support thereof states as follows:

1. On March 30, 1998, **R. BRYAN HASKINS**, counsel for the Defendant, applied for a job as an Assistant Commonwealth's Attorney with **DAVID N. GRIMES**, Commonwealth's Attorney and the prosecuting attorney in this case.

2. This fact was not revealed to the Defendant prior to trial on April 13, 1998.

3. On April 25, 1998, **R. BRYAN HASKINS** formally accepted employment as an assistant to **DAVID N. GRIMES.**

4. The Defendant's motion to set aside the jury verdict and grant a new trial pivots on the actions of **R. BRYAN HASKINS** and will require his testimony.

5. The dual allegiance to his former client and his present employer create an inescapable appearance of and an actual conflict.

6. The Defendant has a right to a prosecutor, free of any conflict of interest in protecting the interest of his employee in a previous role counter to the duties as Commonwealth's Attorney. Likewise, the inherent pressure on **R. BRYAN HASKINS** in testifying in a manner that may be counter to the interest or desire of his employer presents a potential conflict.

WHEREFORE, the Defendant moves this Court to disqualify the Commonwealth's Attorney and his office and appoint a special prosecutor to conclude the remaining motions and issues pending in this case.

MARK DANA TUNER
BY: Glenn L. Berger
Of Counsel

Glenn L. Berger, Esquire
BERGER & THORNHILL
Post Office Box 298
Altavista, Virginia 24517

CERTIFICATE

This is to certify that I have this 1st day of December, 1998, telefaxed and mailed a true copy of the foregoing Motion to the following:

DAVID N. GRIMES, Commonwealth's Attorney
County of Pittsylvania
Post Office Box 1068
Chatham, Virginia 24531

/s/Glenn L. Berger
Glenn L. Berger

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF PITTSYLVANIA

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

MARK DANA TURNER,

Defendant.

CASE NUMBERS: CR97001267-00
CR97001282-00

MOTION

Comes now the Defendant, **MARK DANA TURNER**, by counsel, and moves the Court to set aside the jury verdict and grant the Defendant a new trial and in support thereof states as follows:

1. The Sixth Amendment of the United States Constitution guarantees the Defendant the right to effective assistance of counsel in criminal prosecutions.

2. The Court appointed **ROBERT BRYAN HASKINS** as the attorney for the Defendant on the charges of murder and use of a firearm in the commission of murder.

3. At the time of trial, counsel for the Defendant had applied for a job in the Office of the

Commonwealths Attorney for the County of Pittsylvania and was seeking a job in said office.

4. **DAVID N. GRIMES,** the Commonwealth's Attorney who prosecuted this case, was the person who would decide whether or not to hire **ROBERT BRYAN HASKINS** or some other applicant.

5. **ROBERT BRYAN HASKINS** did not disclose any of this information to the Defendant prior to trial.

6. **DAVID N. GRIMES** chose to employ **ROBERT BRYAN HASKINS** as an Assistant Commonwealth's Attorney shortly after completion of the trial of this case.

7. The Defendant submits that an inevitable conflict of interest exists between counsel's duty to represent his client and his desire to not offend or displease the prosecutor who would be determining whether or not he was employed, which said decision was pending at the time of this trial.

8. The Defendant submits that his counsel failed to:

a. Attempt to suppress the search of the Defendant's residence based on his inability to validly consent to the search; and

b. Attempt to suppress statements based on the lack of probable cause to arrest the Defendant; and

c. Challenge the jury panel which was comprised of three relatives of the Sheriff's Department for the County of Pittsylvania or to challenge these jurors for cause; and

d. Argue in support of the Defendant's Batson motion; and

e. Object to the prosecution leading on numerous occasions throughout the trial; and

f. Object to the prosecutor's opening statements about the Defendant's drinking in weeks prior, about the Defendant's change in jobs or concerning prior difficulties between the parties; and

g. Object to the prosecution's putting into evidence the Defendant's work history which was irrelevant and solely used to prejudice the Defendant; and

h. Object to any statements of **CARL POWELL** and **ANNA CONRAD** relating to telephone conversations that were irrelevant, prejudicial and if anything showed other unlawful conduct that was not relevant and inadmissible; and

i. Object to prejudicial hearsay that was admitted; and

j. Object to the prosecutor's statement in front of the jury that the Defendant had tried to exclude part of his statement; and

k. Object to the crime scene photographs of the deceased; and

l. Submit any evidence or argue concerning the competency of the Defendant to waive his Miranda rights due to the consumption of alcohol; and

m. Produce any evidence for sentencing despite the availability of significant character evidence; and

n. Object to the medical examiner's report as being hearsay.

WHEREFORE, the Defendant submits that he was denied effective assistance of counsel that he was denied counsel whose interests were undivided, that his attorney had a conflict of interest and that significant and cumulative errors and omissions were affecting his right to a fair trial with effective assistance of counsel. For these reasons, the verdict of the jury should be set aside and the Defendant granted a new trial.

MARK DANA TURNER

BY: /s/Glenn L. Berger
Of Counsel

Glenn L. Berger, Esquire
BERGER & THORNH ILL
Post Office Box 298
Altavista, Virginia 24517

CERTIFICATE

This is to certify that I have this 24th day of November, 1998, mailed a true copy of the foregoing Motion to the following:

DAVID N. GRIMES, Commonwealth's Attorney
County of Pittsylvania
Post Office Box 1068
Chatham, Virginia 24531

/s/Glenn L. Berger
GLENN L. BERGER

AFFIDAVIT

I, Jim Allen, after being duly sworn, do state as follows:

1) On April 13, 1998 I attended the trial of Mark Dana Turner in the Circuit Court for the County of Pittsylvania, Virginia.

2) I was shocked when R. Bryan Haskins told me he never triad a murder case before.

3) During one of the breaks in the trial Mr. Haskins told me he did not feel the prosecution had proven their case and saw no reason to call any witnesses either material or character. He said he did not want to make the prosecutor mad. That it might cause him to bring negative character witnesses to the stand. The Prosecution had already rested their case at this point and did not have any negative character witnesses left.

4) I found out shortly after the trial why Mr. Haskins had not wanted to upset the Prosecuting attorney he is now working for him.

5) I have known Mark Dana Turner his entire life and during that time I have never heard him tell any untruth. He lived with my parents and I from the time he was 11 years old. During those years I have never seen Mark even as much as raise his voice at anyone in anger.

6) Mark wanted to take the stand in his own defense and his attorney in front of me told him not to because the Prosecution had not proven its case. Mark has never changed his account of what happened that evening. From day one Mark said he was holding the gun and Kim grabbed the end of it and pushed him against the wall and the gun went off accidentally. Mr. Haskins did not ask to have the barrel of the rifle finger printed nor did the prosecution. This would have corroborated Marks story of how the shooting occurred. There were no witnesses other than Mark and Kim. Mark says the shooting was an accident. The sentence he received is one you would expect for someone who had planned to kill someone not an accidental shooting.

7) During the trial a convicted drug dealer took the stand and was allowed to answer questions regarding Kim's feelings toward Mark without Mr. Haskins once objecting to the fact that the testimony once hearsay or questioning the witnesses truthfulness. The witness's credibility should have been questioned since he was a convicted felon. How could he testify about what the feelings of a dead person were? That is not factual provable evidence. Kim is not here to give her version and there are no other witnesses to corroborate his story.

8) Kim's mother and son hugged Mark and told him they loved him following the trial in my presence.

9) During lunch recess at the trial the Jury was allowed to go across the street or where ever to eat lunch. I was sitting only a few feet away discussing the trial with my cousins Carl Turner and Joy Turner. These Jurors were not isolated from the public and could have heard or discussed with anyone the evidence of the trial.

10) Mark had an entire courtroom full of character witnesses available at the trial to testify prior to the sentencing portion of the trial yet Mr. Haskins chose not to call any of them. Mark's former boss at Puma was there and said he would give Mark his job back at any time.

11) Mark Dana Turner has the biggest heart and is one of the kindest people I have ever known in my lifetime. I would trust him with my life and the lives of anyone I hold near and dear.

12) Mr. Haskins did not object to any of the jurors during the selection phase of the trial. Despite the fact that several of the Jurors had spouses whom were employed by Local or State Law Enforcement Agencies.

13) The entire trial including jury selection was held in one day. The outcome of a mans entire life was decided in one day without hearing any evidence about how he had lived any of the rest of his life. We heard no evidence as to whether he had been a good son or father or husband or employee or law-abiding citizen. Yet there were a court room full of people who were not

subpoenaed who were there to show their love for Mark and to testify that he was a great person, a great employee, a great husband, a great friend, a great brother, a great father, one of the most honest and loyal men to ever live. I cannot understand why that testimony would not have been important for the jury to hear before deciding the fate of Mark's life.

14) The picture presented of Mark Dana Turner was neither accurate nor truthful. In court Mark had his head shaved to a Crewcut and looked like a skinhead in his white shirt. He was trying not to cry and to be brave the entire time he sat in front of that jury which made him look cold and uncaring. That is the opposite of the man I have known his entire life. Mark normally wore his hair a little long and had gentle curls. His normal appearance his entire life was clean cut and gentle.

15) Had Mark's attorney allowed him to testify in his own defense they would have seen a completely different picture than the one they were allowed to see. If they could have gone into that little room at the front of the court house where all Mark's friends gathered before the trial began and during breaks and seen Mark hugging and comforting all the other people so they would not worry the jury would have gotten a completely different picture of Mark.

16) Mr. Haskins told me during the break that he was not going to try and talk to the DA about

reducing the charges or anything else because he felt it was clear they could not prove their case that with no witnesses and no finger prints or ballistic evidence that the prosecution could not prove their case. After the conviction Mr. Haskins told us that since Mark had no previous criminal record that he was certain Mark would not receive more than five years; instead the sentence was 55 years.

17) Mr. Haskins obviously was not capable or experienced enough to handle this type of case. The fact that he did not want to upset the DA and went to work for him right after the trial causes me to ponder his motives during the trial. Was he simply trying to get a job or defend Mark Dana Turner?

18) "Defense Rests" is not a defense.

Subscribed and sworn to before me this 29th day of Jauary, 2001
My Commission expires: September 22, 2001
/s/Thos L. Powell, III

/s/James E. Allen, Jr.